

JUSTICE

The magazine of the International Association of Jewish Lawyers and Jurists

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הארגון הבינלאומי של עורכי-דין ומשפטנים יהודים (ע"ר)
THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS (R.A.)

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President's Message

Some of the articles in the current issue of JUSTICE were read as lectures in the recent conference on “religion in a multicultural society”, which our Association convened in Lausanne. I hope that readers will find these articles, like the others in this edition, of great interest.

I shall shortly be travelling to the United States on a long journey aimed at recruiting American lawyers to our cause and our organization. I have always believed that our organization has great potential in terms of pursuing legal activities but achieving our goals requires us to develop a large membership list of lawyers and jurists and raise sufficient resources to allow us to implement our plans. While making preparations for this trip I returned to the first bulletin published by our Association in 1970 and examined how the goals of our Association were defined at that time. I consider these goals to be equally important and relevant today and therefore take this opportunity to reiterate them:

“The Association, as its name implies, was planned to take a deliberate (but by no means exclusive) interest in matters of the law of particular Jewish concern, along with the general aim of promoting human rights and the rule of law for the benefit of all men.”

Indeed, our standing at the UN as a nongovernmental organization allows us to express our views on a variety of matters related to human rights. At the meeting of the Human Rights Council currently being held in Geneva, our Association is participating in several contexts. One of these is in the discussion of the conclusions of the report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory (including East Jerusalem). Our Association submitted two detailed papers to the mission that deals with this matter. One described the Israeli Supreme Court decisions concerning the human rights of the Palestinians who were at the center of the inquiry and the other described the activities of law enforcement agencies.

In its published report the mission made no reference to these papers and therefore we are continuing to make our position known on this matter. We are also continuing to participate in the discussion on the dangerous situation facing women in India and Pakistan, a matter which has attracted considerable public attention recently; the

marriage of girls under the age of 18, as well as other issues. It is possible to hear the presentations given by our representative in the Council for Human Rights by accessing the IAJLJ site.

An additional issue upon which our Association is focusing is the initiation of legislation regarding refugees in Israel. The State of Israel joined the Refugee Convention but it has not enacted a law enabling the implementation of the Convention. In this regard, our Association is cooperating with The Dror-Israel Movement that approached us and asked for our support for a bill that would regulate this issue. The condition of refugees in Israel is unsatisfactory and must be changed.

Another phenomenon that must be brought back to the forefront of our attention is the revival of the *Protocols of the Elders of Zion* and distribution of this work by hostile elements in various countries and authorities including the Palestinian Authority and Jordan. Several books have been written proving that these protocols are fake, nonetheless the “lie refuses to die” – a phrase used by our Honorary President Judge Hadassa Ben Itto as the title of her book.

I intend to raise this issue in the Association to discuss and consider possible forms of response within the framework of our ongoing battle against antisemitism.

Israel recently held elections and many new political figures and members of Knesset have entered the public arena. We see new and youthful faces in the legislature and hope that they will bring about the economic and social changes needed in the country. This Knesset will have to contend with many contentious topics including the relationship between religion and state, conversion, equality in bearing the burdens of society and negotiations with the Palestinians. The longstanding ties between Likud and the Orthodox parties have been set aside for the present as the people of Israel have changed their priorities and set a new agenda for their political leaders. It will be interesting to see where the new government will lead and we wish it success.

In the last edition of JUSTICE I referred to the ongoing crisis in Syria. I never imagined that half a year later the killing of civilians, including women and children, would be continuing unabated and that a million people would become refugees. It does not seem that this situation is nearing its end and it raises many questions about how the United Nations and the free world regard their role and the measures they are willing to take to bring about



an end to the indiscriminate carnage.

Finally, I would like to announce that the Association's next conference is to be held in The Hague between 9 - 12 October, 2013. The conference will examine the activities of three international courts – the International Criminal Court, the International Court of Justice and the International Criminal Tribunal for the former Yugoslavia - located in The Hague, and the impact of these courts on the development of international law. The level of the prestigious speakers who have agreed to participate in the conference promises that it will be interesting and

enlightening. This conference like the others that we have organized provides an excellent opportunity for jurists from all over the world to meet in a friendly and professional atmosphere. You are welcome to invite lawyers who have not yet attended our conferences to come and join us. I am certain that they will enjoy the experience.

I look forward to welcoming you at The Hague.

Irit Kohn
IJLJ President

State and Religion in Israel

A Perspective by an Arab Christian Citizen and Judge

Salim Joubran*

The State of Israel is a unique country in regard to its human composition – Jews, Arabs, Muslims, Christians and Baha'is.

The population of Israel today is close to 8 million, of which 1.5 million are Arabs - 1,350,000 Muslims, 150,000 Christians. There are 10 recognized Christian communities: the Roman Catholic, Armenian, Maronite, Syriac and Chaldean Catholic Churches; the Eastern Orthodox Greek Orthodox Church; the Oriental Orthodox Syriac Orthodox Church; the Armenian Apostolic Church and the Anglican Evangelical Episcopal Church. In addition there are other small Christian communities.

The institutions of the various religions enjoy full autonomy regarding the internal management of their affairs beginning with control of their holy sites and up to the fact that each community has its own religious tribunals for matters of personal status, in particular marriage and divorce. The state does not intervene in the internal affairs of the different communities save that the High Court of Justice will occasionally intervene in decisions of the religious tribunals when the latter transcend their authority, or in matters of natural justice.

The peaceful coexistence of all communities in the State of Israel is based on mutual respect. We try to create a good atmosphere for peaceful life and are guided by two important terms – tolerance and respect. In many places in Israel we have succeeded in achieving this aim. An example of this is the city of Haifa where I reside; all religions and communities – Jews, Muslims, Christians and Baha'is – live there together. The international center of the Baha'i faith is situated in Haifa.

Once a year, during the month of December, the city of Haifa celebrates the Holiday of all Holidays – Christmas, the birthday of the Prophet Muhammad and Hanukkah. During that month social events take place in which every community participates.

Israel is defined as a Jewish and democratic state, as

formulated in the Basic Laws dealing with civil and human rights.

The Declaration of Independence of the State of Israel of 1948 in accordance with which the Basic Laws are interpreted, states that Israel will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex, and guarantees freedom of religion, conscience, language, education and culture.

All religious communities in Israel enjoy **freedom of religion** and freedom from religion. Each community may maintain its religious beliefs and standards. The Muslims may build their mosques, the Christians may build their churches and the Jews may build their synagogues. For many years Muslims have

been allowed to visit the city holiest to Islam, the city of Mecca in Saudi Arabia, on Pilgrimage. They usually travel to Mecca via Jordan with permission from the Jordanian, Israeli and Saudi Arabian authorities.

Until 1967, the Christians living in Israel were permitted to cross the border in Jerusalem to the eastern part that was under Jordanian rule, to celebrate the Christian holidays in the holy churches. Since 1967, there is, of course, free access.

Every year the President of the State of Israel holds a festive event at his residence honoring the heads of the different religious communities who celebrate Christmas and the New Year. All the leaders of the Christian communities take part in this event. Many government ministers and public figures visit the heads of the Christian and Muslim communities in order to bestow their good wishes for their respective holidays. An interfaith committee exists, which includes leaders of all the religious communities, its role is to initiate collaboration and understanding between all sectors of society. There is also



*Lecture given during the Lausanne Conference of the IAJLJ, October 2012.

a joint Israel - Vatican commission that deals with various issues of common interest.

Freedom of religion in Israel is recognized as one of the constitutional civil rights because it forms part of the Declaration of Independence and due to its links to Human Dignity which is the core of Basic Law: Human Dignity and Liberty.

The starting point is that basic constitutional rights of freedom **of** and **from** religion are not absolute rights. In a multi-cultural society one cannot achieve full protection of one's basic constitutional rights without encountering a conflicting basic right held by another which also calls for constitutional protection. Freedom of religion may conflict with freedom from religion, both of which are constitutional rights of the individual. The judicial solution to this conflict is found in the balance-formula which evaluates the relative weight of each conflicting basic right and searches for the point of balance between them.

In Israel, there has never been a question as to the right of an observant Jew to observe the Sabbath in accordance with his beliefs, as part of the freedom of religion bestowed upon him. But what about a secular individual who wishes to spend time on the Sabbath according to his own belief and life-style – to drive on the Sabbath, watch television, go to a restaurant or theatre, and make use of public transportation? A balance has been reached by law between the full private ability to freely exercise one's right to enjoy one's day of rest and the partial limitations (which have been moderated over the years) on public observance of the Sabbath.

Each religious group in Israel enjoys freedom of religion on the basis of which it is able to practice its beliefs and determine the personal status law to which its congregation is to be subject. Therefore, Israel has maintained a system of religious tribunals which possess exclusive jurisdiction in matrimonial and divorce matters and share parallel jurisdiction with the state's family courts in a number of other matters related to personal status. The four main religious groups that have been granted the authority to establish tribunals and enforce their personal status laws are Jews; Christians; Muslims and Druze.

Since the establishment of the state in 1948, by virtue of being a Jewish and democratic state, certain Jewish religious restrictions apply to Jews working on the Sabbath as well as to public transportation on the Sabbath. Limitations are imposed on the public sale of pork and during Passover on the sale of "hametz" (bread). The Jewish religious parties usually form part of the Israeli government coalition and this to a certain extent maintains the status quo agreement which dates back to the days of Ben-Gurion, in the early years of the state.

Religious Tribunals

Israel has no formal constitution but the Supreme Court regards the existing Basic Laws as a functioning constitution and has applied judicial review to Knesset laws for many years in particular since a landmark decision of the Supreme Court in 1995. Indeed, the Basic Laws of Israel that serve in place of a constitution define the country as a "Jewish and democratic state". These Basic Laws, coupled with Knesset statutes, decisions of the Supreme Court of Israel and various elements of the common law prevailing in Israel, also protect the free practice of religion in the country. The religious courts are part of this wide picture. Legal accommodation of the non-Jewish communities follows the pattern and practice of the Ottoman and British administrations with some important modifications.

For Jews, the religious tribunals are the Rabbinical Courts which consist of twelve regional Rabbinical Courts, the Special Court for Conversion Matters and the Great Rabbinical Court of Appeals.

For Muslims, the religious tribunals are the Sharia Courts which consist of eight regional courts and a court of appeals. The Sharia Courts are empowered to rule in matrimonial, divorce and inheritance related matters.

As to the Christians, each and every church provides its congregation with varying religious services, some of which are related to personal status Christian laws. Although the Christian tribunals are a remnant of the Ottoman Empire era and their existence and work is not regulated by Israeli law and thus they are not part of the official Israeli judicial system, their rulings are recognized and enforced. The Christian tribunals deal with matrimonial and divorce related matters as well as alimony, custody and inheritance matters.

Not only are these tribunals free to apply the respective laws of marriage and divorce to their members, but unlike other religious communities, they are free to appoint the clergy to their religious courts without the involvement or supervision of any public or government agencies.

In the Israeli legal system, the rule of thumb is to allow the religious courts to exercise their powers independently. Even though the rulings of religious courts are final, petitioners have attempted to challenge them before the Supreme Court sitting as the High Court of Justice. Therefore, over the years the HCJ has developed rules according to which it determines when it will intervene in a religious court's rulings.

There are two basic grounds for HCJ intervention:

- A. If the Religious Courts **exceed their authority**.
- B. If the conduct of the Religious Courts conflicts **with principles of natural justice**.

Religious court judges, Dayyanim, Cadis and Cadis Madhab are appointed by the President of the State based on the recommendations of the appointment committees which, like the regular judicial appointment committee, comprise a mix of political and professional people and produce balanced results.

The interesting composition of Israeli society can occasionally give rise to complex problems that reach the High Court of Justice. I will give some examples which relate to the Jewish majority.

The Shabbat and Kosher eating OR the ultra-orthodox-secular dispute

Shabbat (Saturday) is the seventh day of the Jewish week and the Jewish day of rest. On Shabbat, Jews recall the Genesis creation narrative in which God created the Heavens and the Earth in six days and rested on the seventh. Shabbat observance entails refraining from a range of activities prohibited on Shabbat, such as lighting a fire and cooking.

Generally speaking, the operation of a motor vehicle constitutes multiple violations of the prohibited activities on Shabbat.

If religious Jews do not drive on Shabbat in accordance with Jewish Law, what about other people?

A famous case regarding this matter is the “*Bar Ilan Street case*”.¹ Bar Ilan Street in Jerusalem is currently in an ultra-orthodox area where about 98% of the people observe Shabbat, but it is also a main road leading to a hospital. Moreover, we understand that 2% of the locals are non religious Jews or non Jews.

Petitions were submitted against the Transport Minister’s decision to close Bar-Ilan Street on Shabbat. The ensuing judgment opens by saying: “*In Israeli public discourse, Bar-Ilan Street is no longer simply a street. It has become a social concept reflecting a deep-seated political dispute between the ultra-orthodox and the secular populations in this country*”.

Three justices sat on that case and decided, as in the famous “Solomon trial”, to cut the apple into two parts. They decided to keep the street open except during hours of prayer when the local residents were going to or from the synagogues.

The Court, with the very significant exceptions mentioned above, created a balanced approach. The Court recognized the clash between Israel’s values as a democratic and a Jewish state – the clash between freedom of movement and freedom of religion – and expressed understanding for the Jewish orthodox point of view, while not accepting it in its totality. The Court expressed its understanding of the delicate situation in the following words: “*The harm to the ultra-orthodox public’s religious feelings ensuing from the free-flow of traffic on Shabbat in the*

heart of their neighborhood is severe, grave and serious”.

Were the petitioners happy with this decision? Both sides had mixed feelings about it but this is how the Court solved a very tricky problem and the area has been quiet ever since.

Another case brought before the Court related to operating cinema theaters on Shabbat:²

The judgment in this case dealt with the legal question whether a Jerusalem municipal by-law forbidding opening cinemas and other entertainment businesses on Shabbat was void as it had been enacted without authority.

The Court accepted this argument and ruled that freedom of religion is one of the fundamental basic rights. The freedom to believe holds under its wings the freedom not to believe. In some cases, in order to ensure proper social life, freedom of religion must be limited.

Generally, decisions of a religious nature should be dealt with by the primary legislature and not by secondary legislation such as municipal by-laws. In this case, the legislature had not explicitly or indirectly authorized the municipality to manage the cultural life of the city’s residents during Shabbat in so far as it dealt with their fundamental rights.

Furthermore, it was maintained that the prohibition on opening cinemas during Shabbat was unreasonable as the municipal by-law intervened in the secular population’s civil rights, without properly balancing the competing interests.

Kashrut is the body of Jewish law dealing with what foods Jews may or may not eat and how those foods must be prepared and eaten. “Kashrut” comes from the Hebrew root Kaf-Shin-Reish, meaning fit, proper or correct. It is the same root as the more commonly known word “kosher,” which describes food that meets these standards. Pork for instance, is not kosher.

About ten years ago, controversies regarding pork-trading prohibitions in the municipal arena reached the Supreme Court when several municipalities enacted by-laws in this sphere.³ The controversies affected cities and towns with relatively large populations of immigrants from the former Soviet Union, which influenced the local trade in pork. The demographic change suddenly highlighted the problem. This was the background for

1. HCJ 5016/96 *Horev v. Minister of Transportation*, 51(4) PD 1 (1997).
2. Crim. 3471/87 *State of Israel v. Amatzia Kaplan*, 48(2) PD 265 (1987).
3. HCJ 953/01 *Solodkin v. Beit Shemesh Municipality*, 58(5) PD 595 (2004).

developments in the city of Beth-Shemesh, which had no prior municipal by-law on pork trading. At the same time as immigrants were asking for pork trading, an orthodox neighborhood was built in the city which led to an influx of orthodox Jews. The city council voted to promulgate a municipal by-law that would set limitations on the sale of pork. At this stage, a petition was submitted to the High Court of Justice emphasizing the harm that this would cause to the immigrant population. The petition stated that the new by-law lacked proportionality, arguing that it should have restricted the prohibition to religious neighborhoods. The Court granted broad discretion to municipalities in the matter subject to certain normative guidelines. According to the Court, promulgating such a by-law would only be justified when a significant majority felt offended by the absence of such a regulation. The Court's ruling was confined to the prohibition on pork in view of its particular sensitivity to certain Jewish individuals and communities.

Gender segregation in buses

In 1997, public transport companies began to operate special bus lines for the ultra-orthodox public, "mehadrin" lines. The lines ran mostly between major ultra-orthodox population centers and in which gender segregation rules applied. In these sex-segregated buses, female passengers were to sit in the back of the bus and if possible enter and exit the bus through the back door, while the male passengers were to sit in the front part of the bus and enter and exit through the front door. Additionally, "modest dress" was required for women, playing a radio or secular music on the bus was to be avoided and advertisements were censored in terms of modesty. Mehadrin lines were generally cheaper than other lines.

In January 2011, the High Court of Justice ruled that gender segregation was unlawful and abolished the "mehadrin" public buses.⁴ However, the Court ruling allowed the continuation of gender separation in public buses on a strictly voluntary basis.

In this ruling, the Supreme Court said: *"A public transportation company (like any other entity) cannot say, ask or tell women where to sit on a bus simply because they are female, nor can the company tell the women what they should wear; they are entitled to sit anywhere they wish. Of course, this also applies to the men, but for reasons that are obvious, the complaints have to do with the harmful behavior towards women."*

Couple formation and divorce

One of the unique features of marriage and divorce in Israel is the religious legal system that regulates marital

and family status. This goes back many centuries, to the Ottoman (Turkish) rule in the country. As I mentioned before, all matters of marriage and divorce have been delegated to the religious courts of the various communities.

All issues of property division and child custody may be adjudicated in either a civil court or a religious court but the writ of divorce remains solely within the authority of the religious courts. Since the civil courts are generally viewed as more favorable to women, it is in each spouse's interest to be the first to file suit in the court of his or her preference.

Conversion to Judaism

Conversion to Judaism is a formal act undertaken by a non-Jewish person who wishes to be recognized as a member of a Jewish community.

Under Jewish law, a person is Jewish if born to a Jewish mother or if he or she converts. Any individual, regardless of former religion, race, color or sex, is eligible to apply for conversion.

In Israel, any person who successfully completes the conversion process then becomes a "Jew for all intents and purposes" and his or her status is identical to that of any other Jew.

Israel has historically adopted the orthodox conversion process. Orthodox Jews do not necessarily recognize conversions performed under the auspices of other Judaic trends. The Israeli rabbinate (e.g. for purposes of marriage) only recognizes orthodox conversions.

Conversion traditionally requires a three-member religious court and involves acceptance of Judaism, immersion in a ritual bath (mikveh), and circumcision for males. Studying the basics of Judaism is a necessary precondition for conversion.

As one can see, the main theme when balancing between conflicting basic rights pertaining to freedom of and from religion is to identify the point of equilibrium within a pluralistic, multi-cultural society. The mode of creating this balance and the outcome of this process are often matters of controversy both within the Court itself, and in the public at large.

It is important to understand that due to the complexity and sensitivity of religious matters, the High Court of Justice deals with these issues with much compassion and caution. In many ways it acts as a mediator bringing the sides to some form of dialogue so that they can find a solution that fits them both.

4. HCJ 746/07 *Naomi Ragen v. Ministry of Transport*, Tak-El 2008(1) 666, given on 5.1.2011.

Israel is a Jewish state. At the same time, it is a democratic country committed to the protection of human rights. The harmonious combination of these two basic values, lying at the core of our state is an on-going process.

Section 1 of the Foundations of Law Law, 1980 states: *“Where the Court, faced with a legal question requiring decision, finds no answer to it in statute law or case law or by analogy, it shall decide the issue in the light of the principles of freedom, justice, equity and peace of the Jewish heritage”*. Generally speaking, this section relates to the interpretation of the law in cases of lacunae.

In addition, as an inspiration for my own judgments I try to combine and rely on holy sources. I tend to quote and compare laws and case laws from the Bible, the New Testament and the Koran, in the belief that we can learn from the past and that we should respect the heritage of all religions.

A good example of the synthesis between the conflicting values of the religions is Israel’s attitude towards non-Jews in Israel. In Israel itself, all should be equal. True, a special key to enter Israel was given to Jews and their families as Israel was established to solve the Jewish historic problem that finds its expression in the Law of Return which entitles any Jew to immigrate to Israel. However, once the individual is inside the house, he should enjoy the same rights as every other member of the house. There should be no discrimination between the members of the house. I cannot say that there is full equality between Arabs and Jews in Israel. There are still some fields of life where there is no equality although I should mention that in the last few years there has been some progress in this matter. In a great number of cases, the Israeli Supreme Court expressed this principle, for example, a judgment in which the High Court of Justice declared that the state must treat Jews and Arabs equally in the allocation of state land.⁵ We were criticized on the ground that this decision would bring about the end of Zionism. Nothing could be more false. As the former President of the Supreme Court, Aharon Barak said: *“Zionism is not based on discrimination between Jews and Arabs. Zionism views Israel as a national home for Jews; however, it is based on the negation of racism, and on concepts of equality”*.⁶

Jewish minority attacks on Christian churches

Before concluding, I would like to mention a very severe and troubling matter of attacks by extreme Jewish religious groups against Muslim and Christian religious institutions. We are dealing with a small number of people and incidents but by their actions they cause great affliction to co-existence between all religions. These actions have

been publicly and widely condemned by political and religious leaders including the President of the State, the Prime Minister, the Speaker of the Parliament, Ministers of the Government, leaders in academia and other prominent leaders. I am hopeful that we will not see similar actions in the future so that we can maintain the unique relations between all religions and denominations in the State of Israel. After the attack at the Latrun Monastery two months ago a group of students from the Hebrew University in Jerusalem came to support the residents of the Monastery and assisted in cleaning up the horrible graffiti that was written on the walls of the Monastery. We are determined to continue our joint living together – Jews, Christians and Muslims in peace, quiet coexistence and mutual respect. I believe that this is in the best interest of the country and its citizens.

The normal day to day life, as I described before, is totally different to these few incidents. Our country can serve as a fine example not only in our war afflicted part of the world, but elsewhere too. ■

Justice Salim Joubran, born 1947, is an Israeli Arab judge on the Israeli Supreme Court. He has served as a Supreme Court justice since 2003, and became a permanent member in May 2004. Justice Joubran is the first Arab to receive a permanent appointment in the Supreme Court. He is the second Arab judge to hold a Supreme Court appointment.

5. HCJ 6698/95 *Aadel Kaadan v. Israel Lands Administration*, 54(1) PD 258 (2000).
6. Aharon Barak, *Zionism is not based on discrimination between Jews and Arabs*, *Globes*, 22.5.2000.

Clarification: in *JUSTICE* 51, we published an article by Prof. Nitza Nachmias, “Quo Vadis UNRWA”. Prof. Nachmias wishes to clarify that she is a lecturer in the MA program on Conflict Resolution in TAU and does not run it.

State, Religion and Law in India

Sujata Manohar*

A major challenge facing the twenty-first century is accommodating cultural and religious diversity within a state without sacrificing the identity and values distinctive of that state. Is it possible to have a constitutional and legal structure which guarantees human rights to all and at the same time protects customs, practices and laws which are religious or tribal in origin?

Tradition and religion are frequently used by a state to override its human rights obligations, especially towards minorities and women. Cultural relativism is put forth as a reason for denying universality of human rights. Cultural and religious diversity within a state makes compliance with human rights even more complicated. With the globalization of the economy, almost instant communications and easy movement of people across countries with unprecedented rapidity, there is no time for gradual assimilation of differences among people. Most nations now have to deal with ethno-cultural diversity. As a result of globalization of the economy and ease of migration nations which were culturally homogeneous are now faced with multi-cultures. How and to what extent should such diversity be accommodated? How far should such differences be recognized by the legal system? Should the migrants carry with them their own laws and customs? I hope that the struggles of India will provide some guidance on the law's ability to accommodate cultural and religious diversity while retaining secular values based on human rights as understood nationally and internationally. The state's ability, in a multicultural and multi-religious society, to render justice in its fullest sense to all depends on this. A consequential question that arises is: can cultural and religious practices be adapted to modern times to make them consistent with human rights? Can these be made compliant with current values of civilization without destroying their essence?

While multiculturalism is new to Western societies which have been culturally homogenous in the past, Asian countries have had to deal with multiculturalism dating back several centuries. Many Asian societies have their own tradition of peaceful or not so peaceful coexistence amongst linguistic and religiously diverse groups. As Will Kymlicka and Baogang He¹ put it, all of the major ethical

and religious traditions in the Asian region – from Confucian and Buddhist to Islamic and Hindu – have their own conceptions of the value of tolerance, and their own recipes for sustaining unity amidst diversity. The Sanskrit phrase “*Sarva dharma samabhava*” meaning equal respect for all religions and the Upanishadic saying “*Aa no bhadraha kritavah yantu vishwatah* - Let good thoughts come from all over the world,” are indicative of this spirit. The rhetoric of multiculturalism may now be ubiquitous around the world, but the word is being used to express quite different ideas which are rooted in different traditions, both Western and Eastern.



India is home to Hindus, Muslims, Jews, Christians, Zoroastrians, Buddhists, Jains, Sikhs and Baha'is. One of the oldest Jewish settlements in Cochin in Southern India traces its ancestry to the Jews exiled by King Nebuchadnezzar. Another version dates the arrival of Jews in Cochin still earlier to the days of King Solomon. The Jews were granted a “kingdom” in a Kerala village by the Kerala king in 379 A.D. for meritorious service. The origins of Christianity in Kerala date back to the arrival of St. Thomas the Apostle in Kerala in 52 A.D. The second period of Christian missionary activity started after the arrival of Vasco da Gama in India in 1498. The largest settlement of Baha'is, the followers of a “new” contemporary religion, is also in India. Hinduism, the oldest religion in the world, is the religion of the majority. It has no single holy book, its religious philosophy is multidimensional and it has no structured religious order. The tradition of tolerance is fundamental to Hinduism and has enabled other religions to find a home in India.

India became a single political entity in 1947 after the departure of the British and the subsequent merger of princely states. During the freedom struggle in which people of all religions took part, an emphasis was placed on creating a nation of all peoples of all religions in India. When the British carved out a separate state for Muslims

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1. Will Kymlicka and Baogang (eds.), *Multiculturalism in Asia* (2005).

on the basis of religion amidst unprecedented bloodshed, India vowed to be secular. At present, 13.4% of India's population is Muslim², the largest in the world in numbers after Indonesia. When the Constitution³ was promulgated in 1950, freedom of religion was guaranteed as a fundamental right of all people of the country, although the word "secular" was added to the preamble later.

Secularism can have more than one meaning. It can mean (1) the state shall not have any official religion. As a corollary, there will not be any religion in the public sphere. (2) There shall be no state preference for any religion. (3) It can also mean that all religions may be practiced and that public manifestations of all religions are permissible. (4) The state will not give aid or subsidies to any religion either for construction of temples, mosques or churches or for any other religious purpose. India has embraced secularism in all its aspects. Article 25 of the Indian Constitution⁴ guarantees freedom of conscience and the right freely to profess, practice and propagate religion. It permits wearing items of religious significance such as a kirpan by the Sikhs, a cross by the Christians, etc. The wearing of a veil or burkha has not been an issue. People have the freedom to dress in the way they like. The existence of minority schools and colleges has possibly provided an alternative to Muslim women and girls who wear a burkha.

Articles 14, 15 and 16⁵ provide for equality before the law and equal protection of the law to everyone. These articles provide that there will be no discrimination between persons on various grounds including on the ground of religion. Article 15,⁶ however, permits special provision being made in favour of women and children.

There is freedom of speech and expression for all under Article 19.⁷ This right, however, is subject to reasonable restrictions – *inter alia*, on the ground of public order, decency, morality and incitement to an offence. Hate speech deliberately made with intent to outrage religious feelings of any class of citizens or to insult religious beliefs is an offence.⁸ All religious groups are thus dealt with in the same fashion. There is, however, no law about blasphemy. Freedom of expression is fundamental to a democracy. Hence the courts, in case of any action for prohibiting hate speech, are likely to hold that people may have a public debate to express their doubts and criticism about a religious belief but not merely to malign it. If an issue of this nature arises before the courts, the decisions of the European Court of Human Rights will, I am sure, have persuasive value before the Indian courts in this regard.

Under Article 28⁹ the study of religions and philosophy is permissible in state-run institutions but the imparting

of religious instruction is not. The minorities, including religious minorities, have the right to establish and administer educational institutions of their choice under Article 30.¹⁰ These are also some of the human rights which have been incorporated in the Universal Declaration of Human Rights. The task of enforcing these fundamental rights, and resolving conflicts between them, has fallen on the higher judiciary of the country.

India was faced with a major problem in giving recognition to the right to equality and nondiscrimination on the ground of race, religion, caste, sex or place of birth. During the days of British rule, the legal structure in India had uniform laws applicable to most secular activities such as commerce and banking, company law, property rights, law of contract, and the laws relating to crimes and punishment, law of evidence, civil and criminal procedure and the like. The same continues today. Both the economic and the penal laws are secular. However, there are personal laws such as the law of marriage and divorce, inheritance and succession, custody of children, maintenance, guardianship, adoption and the like where the law administered depends upon the religion of the parties. Hindus have Hindu law, Muslims have Muslim law based on Shariat as interpreted in India, Christians have their own separate statutory law, Parsi Zoroastrians have separate statutory laws. The Jews in India are governed by Jewish law. In 1925 in the case of *Benjamin v. Benjamin*,¹¹ the Bombay High Court examined the nature of that law, as applicable to a divorce claim instituted by a Jew. It held that Jews are now widely dispersed and many provisions of the Rabbinical Code have been modified by custom. The law is founded on the Mosaic and Talmudic law. In the 16th century that law was codified in the "*Shulchan Aruch*". The substance of matrimonial law in the third part of that work is reproduced in Dr Mielziner's book "*The Jewish Law of Marriage and Divorce*".¹²

2. Website, Census of India 2011, Government of India, Ministry of Home Affairs, p. 1.
3. The Constitution of India, see at <http://lawmin.nic.in/coi/coiason29july08.pdf> (last visited on January 8, 2013).
4. *Supra* note 3.
5. *Supra* note 3.
6. *Supra* note 3.
7. *Supra* note 3.
8. The Indian Penal Code, 1860 Sec. 295A.
9. *Supra* note 3.
10. *Supra* note 3.
11. *Benjamin v. Benjamin*, AIR 1926 Bom 169.
12. Moses Mielziner, *The Jewish Law Of Marriage And Divorce In Ancient And Modern Times and Its Relation to the Law of the State* (1884).

This was followed by the court. Justice Madon's judgment in 1968 in *Solomon v. Solomon*¹³ contains a clear and brief exposition of the Jewish law.¹⁴

Laws which are based on religion usually reflect the social values of a past age. Such laws usually have a built-in inequality between men and women. None of the personal laws provides equal treatment of men and women. And there is also no equal treatment of persons professing different faiths under the law since the applicable personal laws are different. Their rights and obligations differ, depending on the religion they profess. A secular law is also available to those who chose it. Article 13 of the Constitution¹⁵ provides that all laws in force immediately before the commencement of the Constitution, in so far as they are inconsistent with the provisions relating to fundamental rights in the Constitution - which includes the equality article, shall be, to the extent of such inconsistency, void. 1951¹⁶ saw the first challenge brought before the courts under Article 13;¹⁷ it related to the personal laws. All personal laws in force, treated men and women unequally. The rights and obligations conferred by such laws were also unequal between different religious groups. Were these laws void? The courts took the view that personal laws were not covered by Article 13.¹⁸ Only statutory laws were so covered. The court held that inequality within personal laws would have to be eliminated by legislative reform by Parliament. This has been the consistent stand of the law courts. The Constitution,¹⁹ however, directs the state, under Article 44, to have a uniform civil code applicable to all, irrespective of religion. But this is only a directive and not an enforceable right, although it was a major demand voiced during the freedom struggle, especially by women who were the main victims of discrimination under all personal laws. Law reform to bring equality in religious laws has been slow in coming.

Thus, when India signed the CEDAW treaty (Convention on Elimination of all Forms of Discrimination against Women) it entered a caveat to the effect that it will not change the personal laws of any religious group unless that group asks for a change in the law. This demand by religious minorities has taken a long time to become vocal.

Legislative reform has been slow. However, the Hindu law, being the law of the majority, was the first to be amended soon after the Constitution²⁰ came into force. In 1955 and 1956 four major laws²¹ were enacted changing Hindu law fundamentally by giving women equal rights which they had not possessed earlier. However, the process of giving equality in the personal sphere is not complete even now. Customs and customary law have not always been amenable to change. The process of abolishing

harmful customs by statute started in British days as a result of a strong movement for social reform. *Sati* or a widow burning herself on her husband's funeral pyre was banned in 1829 and the practice has been obliterated. A hundred years later, in 1929 the Child Marriage Restraint Act and Hindu Widows Remarriage Act²² were enacted and in 1937 Hindu women obtained a limited right to inherit property.²³ Major changes came about for the first time after independence in 1955 and 1956. But other necessary changes even in Hindu law have taken many decades. Customs and customary laws have had to be abolished by specific statutes and not through the application of human rights treaties as embodied in the Constitution. In this respect, the Indian Constitution is more conservative than the constitutions of some of the African countries where the constitution prevails over customary law. Thus, the Dowry Prohibition Act 1961(amended in 1986)²⁴ was specifically enacted to abolish dowry; additionally, a revivalist movement favouring *Sati* was stopped by the Commission of *Sati* (Prevention) Act 1987.²⁵ In 2005, after half a century, Hindu law was again fundamentally amended by giving women a share in the joint family property at birth.²⁶

This is how religious laws of the majority have been changed to bring them into line with constitutional rights and human rights. In the *Vishakha case*²⁷ in 1997, the

13. *Solomon v. Solomon* (1979) 81 BOMLR 578.

14. See also *Engel v. Engel*, 45 BLR 921, *Silas v. Silas*, AIR 1983 Bom 263 and *Samuel v. Samuel* 1987 Mah. L.J. 99.

15. *Supra* note 3.

16. *Supra* note 3.

17. *Supra* note 3.

18. *Supra* note 3.

19. *Supra* note 3.

20. *Supra* note 3.

21. Hindu Marriage Act 1955, Hindu Succession Act 1956, Hindu Minority & Guardianship Act 1956, Hindu Adoptions & Maintenance Act 1956.

22. See at <http://wcd.nic.in/cm1929.html>

23. Hindu Women's Right to Property Act, 1937, see at http://bdlaws.minlaw.gov.bd/pdf_part.php?id=171 (last visited January 8, 2013).

24. See at <http://wcd.nic.in/dowryprohibitionact.html> (last visited January 8, 2013).

25. See at <http://wcd.nic.in/commissionofsatiprevention.html> (last visited January 8, 2013).

26. Hindu Succession (Amendment) Act 2005 http://www.hrln.org/admin/issue/subpdf/HSA_Amendment_2005.pdf (last visited January 8, 2013).

27. *Vishakha v. State of Rajasthan* 1997 (6) SCC 241.

Supreme Court held that where there was an absence of laws, international treaties on human rights signed by India could be used legally to fill the lacuna – in the case before the Supreme Court, in respect of sexual harassment. This can also be looked at as an attempt to harmonize the national legal system with international human rights law. The legal changes have been accepted when they meet long pending demands, although the necessary social changes have been slow.

The religious minorities have had to wait much longer for a change in their personal laws. For religious minorities, the government has taken the view that unless the demand for reform comes from the concerned religious community, the government will not introduce law reform. This is reflected in the caveat entered at the time of India signing CEDAW. This has slowed down considerably the process of incorporating equality of rights into their personal law. At the same time it is meant to ensure that when the law is amended it will find acceptance.

The Mohamedan Law in India is based on Shariat Law as applied in India. Its customary modifications, many of which were beneficial, were abolished by the Shariat Act of 1937.²⁸ There is no separate penal law for Muslims. The law of commerce and banking also does not recognize religious differences. The Shariat law applied in India is as interpreted by the British courts and it applies in the field of personal laws. By and large, Muslim clerics interpreted Muslim personal law before the British courts in a manner which upheld a Muslim man's right to divorce his wife without having to give any reason for the same, simply by pronouncing '*talaq*' thrice. Under this law, even the presence of the woman is not necessary in order to divorce her. The law also denies to a Muslim woman on divorce anything more than the contractual amount (*Mahr*) specified under the marriage contract. In India this is customarily a nominal amount. A Muslim man can marry four wives at a time.

There are inequalities under Muslim law in respect of inheritance although the Muslim law was one of the first to give women a right of inheritance. Her share, however, is half that of her male counterpart. The issue of equality in the personal law of the Muslims is linked to two sets of often conflicting fundamental rights under the Constitution,²⁹ namely equality and nondiscrimination on the ground of sex on the one hand, and the constitutional protection given to minorities to preserve their own traditions and culture on the other hand. As is usually the case, what is often protected in the name of tradition and culture is unequal treatment of women and their vulnerability. While the law relating to the majority community could quickly be made more egalitarian, the same has not been possible for the minority.

The demand for law reform from the Muslim community has been slow in coming. For example, in the area of maintenance the Muslim law permits maintenance being given to a Muslim woman only during the period of *Iddat* (3 months). In the famous *Shah Bano case*³⁰ the Supreme Court tried to help divorced Muslim women by giving them the benefit of a secular law³¹ which grants maintenance to divorced women, children and parents to prevent destitution. The protests from the orthodox Muslim groups calling such grant of maintenance anti-Islamic, led to the hasty enactment of a law ironically called The Muslim Women (Protection on Divorce) Act 1986³² which explicitly denied to Muslim women any right to maintenance beyond the *Iddat* period of three months under any law. The constitutional challenge to this law has now been dismissed by the Supreme Court by giving an "innovative" interpretation to this Act to the effect that under this Act, the husband must make a reasonable and fair provision for the maintenance of his divorced wife within the *Iddat* period, but this sum must take care of her needs during her lifetime!

Another area of concern relates to a woman's right to inherit family lands. In India 87% of all female workers are engaged in agriculture compared to only 56% of all workers.³³ But a woman's right to inherit a share in the family lands is affected by tribal customs or by a state law enacted to prevent fragmentation of agricultural holdings. Agricultural lands are often governed by state-specific tenurial laws which prefer devolution of land through the male line. The Shariat Act of 1937³⁴ has left out agricultural land from its purview, thus retaining the highly gender unequal inheritance of family lands. Since then some of the states have enacted laws to give women a share in the family land but many have not.

The Christians were covered by a highly gender unequal

28. The Muslim Personal Law (Shariat) Application Act, 1937, see at <http://www.indiankanoon.org/doc/1325952/> (last visited January 8, 2013).

29. *Supra* note 3.

30. *Mahommed Ahmed Khan v Shah Bano Begum* AIR 1985 SC. 945.

31. The Code of Criminal Procedure 1973 (India), Sec. 125.

32. The Muslim Women (Protection of Rights on Divorce) Act, 1986, see at <http://www.indiankanoon.org/doc/1933289/> (last visited January 8, 2013).

33. Website, Census of India, 2011, Government of India, Ministry of Home Affairs.

34. See *supra* note 28.

35. See at <http://www.indiankanoon.org/doc/806295/> (last visited January 8, 2013).

law of divorce. The Indian Divorce Act of 1869³⁵ which applies to Christians, was finally amended in 1998 to bring it in line with the civil law of divorce, thus giving women the same rights as men to obtain a divorce. There were also laws in some former princely states giving Christian women only a limited right of inheritance. In the *Mary Roy case*³⁶ in 1986 the Supreme Court struck down a pre-independence succession law for Christians in the former state of Travancore, which gave Christian women a very limited right of inheritance. Thus, the Christian law has been reformed partly by legislation and partly by judicial intervention.

The Parsi Marriage and Divorce Act, 1936,³⁷ was amended in 1988 to provide broader based grounds for divorce to Parsee Zoroastrians, which are available to both husband and wife under the Special Marriage Act.³⁸ These also include divorce by mutual consent. As a result, the matrimonial law of all religious communities, except the Muslim community, has now become similar. The Parsi law of inheritance contained in the Indian Succession Act, 1925³⁹ was amended in 1991 to give daughters the same share as sons.

The constitutional protection given to minorities under Article 30⁴⁰ has, however, created difficulties in interpretation. By large, these have been worked out through judicial decisions. A religious minority under Article 30⁴¹ has the right to establish and administer educational institutions of its choice. This has been interpreted by the courts as giving the minorities the right and the freedom to establish educational institutions imparting either religious or secular education. In fact, some of the best educational institutions in the country are run by Christian missionaries. Their educational institutions also have the right to receive aid from the state in the same manner as other educational institutions. However, though the minorities have the right to manage these institutions, the state may promulgate regulations to prevent their mismanagement. Minorities can pursue their own policies for admission to their educational institutions subject to public policy. If they receive aid from the state, they cannot deny admission to anyone on the ground of religion, race, caste or language. However, in the *T.M.A. Pai Foundation case*⁴² the Supreme Court held that even if a minority educational institution receives state funding, it is entitled to preserve its minority character and may admit, on a reasonable basis, the students belonging to that minority, at the same time, it must also admit non-minorities on merit. The percentage of such non-minority admissions can be determined by the state on a reasonable basis taking into account the requirements and character of the institution, the needs of the society and public interest. Additionally, minorities

cannot be denied admission to any state-run educational institution on the ground of religion.

Balancing conflicting interests in order to create constitutional parities is a complex process. Diversity in the dissenting opinions in the *T.M.A. Pai case* reflects this complex process of weaving together diverse strands of culture, religion, race, caste and language to create a strong fabric of unity in the nation.

The process of enacting uniform laws which apply to all and which are compliant with the Constitution,⁴³ in letter and spirit, is an ongoing process for India; but it is a necessary one. Divergences in laws which impart different rights to different groups in similar situations, create a sense of injustice and unfairness. But to persuade the minorities to modify their customary religious laws in order to secure their constitutional rights is equally difficult. All minorities, except the Muslims, have had their laws modified or altered, and as a result, their laws now conform with the laws of other religious groups and with the constitutional values. The extremists among the Muslims have prevented the more rational Muslims from making reasonable changes in their personal laws, even those which conform with the dictates of their own religion. In fact, such elements have encouraged a greater display of diversity - such as more Muslim women wearing burkhas. This can be described as a display of identity or of diversity, depending on one's point of view. But this kind of display may create disharmony and prevent appreciation of thoughts and wisdom underlying the religious doctrines of this minority. This extremist trend needs to be checked. One hopes that an open society which gives freedom to express one's views will tilt the balance in favour of what is reasonable, without it being antithetical to one's religious beliefs.

An outstanding example of assimilation of migrants in their adopted country is the case of the Parsees who sought refuge in India following persecution in Persia in the 10th century A.D. Their two boats landed on the coast of Gujarat

36. *Mary Roy v. State of Kerala* (1986) 2 SCC 209.

37. See at <http://indiankanoon.org/doc/122564/> (last visited January 8, 2013).

38. See at <http://www.legalserviceindia.com/helpline/marriage.html> (last visited January 8, 2013).

39. See at <http://indiankanoon.org/doc/1450343/> (last visited January 8, 2013).

40. *Supra* note 3.

41. *Supra* note 3.

42. *T.M.A. Pai Foundation v. State of Karnataka* (2002) 8 SCC 481.

43. *Supra* note 3.

in Western India. They asked for permission from the king of Sanjan to settle there. The king sent them a cup of milk full to the brim, meaning there was no room for them. The leader of the Parsees added sugar to the cup of milk and sent it back. The king was pleased and gave them shelter. Their promise to add something special to the local culture and yet blend with it, has been more than fulfilled. The Parsees have retained their identity and have produced outstanding Indians who have made a great contribution to the nation. This is the ultimate synthesis of diversities.

Even for the Hindu majority reforms in their personal law, based on religion and customs, have not come easily. Customary Hindu practices, that deny equality to men and women, have not changed despite laws to stop such inequalities. Among these practices, traditional and modern, one can count the custom of demanding dowry by the groom's family at the time of marriage and thereafter. Despite the Dowry Prohibition Act of 1961 (amended in 1986), the custom remains. As a result, the Indian Penal Code had to be amended to add the offences of dowry death and cruelty by the husband or his relatives.⁴⁴ The practice of dowry is prevalent among the minorities as well. The "modern" practice of female foeticide has led to the enactment of the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (PNDT Act)⁴⁵ prohibiting any sex determination test of a pregnant woman.

Domestic violence prevalent among all communities is another area where finally a law has been enacted. As yet the Protection of Women from Domestic Violence Act, 2005⁴⁶ has not made any major impact. Legal reforms and elimination of harmful customs through law require the support of a strong social change movement among the people. Without such support from social reformers, law may not be effective.

But should one wait for social acceptance before enacting or amending personal laws? This may delay or even indefinitely postpone much needed legal changes. On the other hand, the promulgation of a law against, for example, a prevailing custom, is itself a strong signal that the custom is unacceptable. Penalties provided in the law for its violation can put a stop to such practices. Indeed, the law itself educates the community that their practice is wrong. Thus, a speedy enactment of a proper law may accelerate the requisite change in social behavior. At the same time, an unwanted law may result in its evasion. We have had an ongoing debate on this issue for the last 60 years and more. India now seems to have reached a compromise solution. One needs existence of a movement for social reform and, at the same time, one must have legal reform without waiting for an overwhelming social

demand for it. The PNDT Act of 1994⁴⁷ and the Domestic Violence Act 2005⁴⁸ are examples of such laws. Neither, however, deal with changes in personal laws. I hope that this approach will be used to reform personal laws that need change, including Muslim personal law. I also believe that the movement for a fundamental social transformation has started. The right to education and the right to information are both now justiciable and enforceable rights. These should help all religious groups to critically examine their laws and bring their personal laws into harmony with human rights as embodied in the Indian Constitution. This requires education, support for the liberal views within the community and a healthy debate to decide how equality can be generated, where diversity is acceptable in culture and behavior and where it is not, and how one can practice one's religion without compromising human rights, as we now understand them. Confidence must be generated in all people in the country that their legitimate expectations will be fulfilled, so that the minorities have the confidence to modify their own customs, traditions and laws in such a manner as to give to the minorities their constitutional entitlements in letter and spirit. The majority must have a strong reformist agenda which it can implement through law accompanied by social transformation. Above all, there must be tolerance and acceptance of differences, so that all people will have the freedom to express themselves, to contribute to the nation's wealth and to fulfill themselves. I hope the example of India will show that this synthesis between religion and human values, although difficult and slow, moving is possible and necessary. ■

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44. *Supra* note 8, Sect. 304B and 498A.

45. See <http://www.indiankanoon.org/doc/151676/> (last visited January 8, 2013).

46. See at <http://www.indiankanoon.org/doc/542601/> (last visited January 8, 2013).

47. See *supra* note 46.

48. See *supra* note 47.

From “Defamation of Religions” to Incitement Based on Religion or Belief

Natan Lerner*

On April 12, 2011, the Human Rights Council adopted Resolution 16/13 on “Freedom of Religion or Belief”. This action represented a clear shift from emphasis on “defamation of religions” – a term employed for several years in UN General Assembly resolutions promoted by Islamic states¹ – to a more general and congruent approach based on the need to strike a balance between freedom of expression and the prohibition of incitement to hatred, discrimination and violence against religious and other groups. The resolution was confirmed by the UN General Assembly but, of course, it was not thereby endowed with obligatory effect.

This kind of delicate balance was the aim of Articles 19 and 20 of the International Covenant on Civil and Political Rights (ICCPR), adopted by the UN General Assembly in 1966, and also of other international instruments – most prominently, the 1965 Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the 1981 United Nations Declaration on the Elimination of all Forms of Intolerance and Discrimination Based on Religion or Belief. The earlier important but ineffective Convention on Genocide – the first and major United Nations human rights treaty, adopted, significantly, one day before the Universal Declaration on Human Rights – is equally relevant to the need to curb incitement to mass crimes. Such crimes, after all, are generally a result of hatred or bias based on religion or ethnicity. It is mainly on these basic instruments² that my arguments are premised.

The term “defamation of religions” was employed in the protracted attempt made at the UN by a large group of Islamic states to induce the world organization to restrict freedom of expression by condemning and outlawing criticism of Islam as a religion. The attempt was opposed by democratic states and liberal NGOs³ that confronted what was an obvious threat to freedom of expression, a fundamental right to be respected but also restricted when abused, as provided in Article 20 of the ICCPR and concurring international instruments. That it should be restricted when such abuse takes place is the essence of

my position.⁴

Of course, international life is regulated not only by the law created by international organizations. The fact that UN organs are not seized currently with proposals concerning the anti-liberal scheme called “defamation of religions” does not mean that everyone accepts its abandonment. For instance, a Pakistani spokesman for the 57 states grouped in the Organization of Islamic Cooperation (OIC) claimed that the General Assembly resolutions on defamation of religions were still valid and that they created a norm prohibiting such defamation. Politics is closely interwoven with international legality, and such a stand is an expression of it. So are legislative measures in several parts of the world, including some democratic regimes, criminalizing speech described as blasphemy. The vociferous protests and acts of violence that erupted in the wake of the foolish and provocative video on the “*Innocence of Muslims*” generated a tense atmosphere that supplied fertile ground for murderous attacks and attempts to restrict freedom of expression.



* This article is based on a paper submitted to the Lausanne Conference on “Religion in a Multicultural Society” October 30-November 4, 2012.

1. On “Defamation of Religions”, see generally *Conscience and Liberty*, 2010: *Defamation of Religions and Freedom of Expression* available at http://www.aidlr.org/fileadmin/files/PDF/CLY_2010.pdf (last visited March 26, 2013), particularly Silvia Angeletti, “*Defamation of Religions in UN Documents*”, p. 40 and Blandine Chelini-Pont, “*International Tug of War over the Defamation of Religion (1999-2009)*”, p. 75.
2. For the respective texts, see U.N. High Commissioner of Human Rights, *Human Rights: A Compilation of International Instruments*, U.N. Doc. ST/HR/1/Rev.6 (Vol. I/Part 2), U. N. Sales No.E.88.XIV.1 (2002).
3. See *supra* note 1.
4. See Nathan Lerner, *Religion, Secular Beliefs and Human Rights*, (2d Rev. ed., 2012), p. 89.

Still, the Secretary General of the OIC, Ekmeleddin Ihsanoglu, announced, at a conference in Istanbul in October 2012, that the Islamic body would not resume its efforts, begun in 1998, to outlaw “defamation of religions.” Instead, he said, the ICCPR and the non-binding 2011 UN resolution “provided a sufficient basis to take legal action” against intolerance directed at Muslims.⁵ The notion “defamation of religion” was widely criticized by scholars and institutions interested in law and religion.⁶ Three UN Special Rapporteurs pointed out in a joint statement in 2009 that the difficulty of providing an objective definition of the words “defamation of religions” made “the whole concept open to abuse.”⁷

The real legal issue is thus not the failed attempt so far to restrict free and permissible criticism of any particular religion, or of religions in general. The issue is how to protect individuals and communities from violence, discrimination and hatred related to religion or belief (as well as other grounds). This is the aim of the aforementioned 2011 Resolution, which calls upon states, *inter alia*, “to take all necessary and appropriate action, in conformity with international human rights obligations, to combat hatred, discrimination, intolerance and acts of violence, intimidation and coercion motivated by intolerance based on religion or belief, as well as any advocacy of religious hatred that constitutes incitement to discrimination, hostility and violence, with particular regard to members of religious minorities in all parts of the world.”

This provision in the Resolution encapsulates the correct approach to the issue of incitement against religious groups and individuals. It reflects the provisions of the ICCPR and the 1981 Declaration, as they should be interpreted in the light of adopted and planned legislation.

It seems appropriate to deal in greater detail with the crucial legal and other dimensions of this issue. Freedom of expression, as proclaimed in Article 19 of the Universal Declaration of Human Rights and Article 19 of the ICCPR, is the general norm. But it is not an absolute right from which no derogation is permitted under Article 4 of the ICCPR, such as, for instance, the right to freedom of religion. States may, and should, limit freedom of expression when it is abused by the advocacy of national, racial or religious hatred that constitutes incitement to 1) discrimination, 2) hostility and 3) violence. Unfortunately, such abuses are generally committed by state organs or agents, and therefore the existence of a democratic regime where the rule of law is respected is a precondition that is not always present. While discrimination and violence are phenomena that are easily identifiable, the same cannot be said about incitement to hostility or hatred or similar evils. For their identification, a competent and independent

judiciary or specialized institutions are indispensable.

The victims to which the cited human rights instruments relate are individuals or a group of individuals and in neither case is it important to identify precisely if they belong to a specific national, racial or religious group. What matters is their self-perception as a defined group and the fact that they are so seen by those who are inciting against them, directly or indirectly, precisely because of their group identification. There is judicial practice concerning that issue.⁸ And this approach is also supported by the joint origin in the early 60s of the UN instruments on racial discrimination and religious intolerance.⁹ It is therefore immaterial whether groups or individuals are defined by religion, race, nationality, language, culture, color or other characteristics. All are entitled to equal protection, without distinctions based on their specific group identity.

This does not mean that there are no differences between incitement to hostility on religious grounds and incitement which is racially motivated. Such differences do exist since racism, in general, is a broader and more inclusive notion than religious intolerance and domestic anti-racist legislation is more frequently agreed upon than legislation dealing with religious bias. Three U.N. Special Rapporteurs, on freedom of religion, freedom of expression, and racism and related intolerance, in a joint submission to an expert workshop that took place some time ago, cautioned against “confusion between a racist element and an act of

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5. Tom Heneghan, *West's free speech stand bars blasphemy ban – OIC*, Reuters, Istanbul, 15 October 2012.
 6. See among many learned articles, Carolyn Evans, *Religion and Freedom of Expression*, Fides et Libertas, p. 51, (2010).
 7. Githu Muigai, Asma Jahangir and Frank La Rue, *Freedom of expression and incitement to racial or religious hatred*, Joint Statement at OHCHR Side Event During the Durban Review Conference, Geneva, 22 April 2009, available at <http://www2.ohchr.org/English/issues/religion/docs/SRjointstatement22april09.pdf> (last visited March 26, 2013).
 8. See, for example, *King-Ansell v. Police* (1979), 2 NZLR 531, where the court stressed the importance of “ancestral ties” and “traditional and cultural values and beliefs” as factors in identifying the nature of the group. A similar approach is discernible in the jurisprudence of the USA, Great Britain, the Netherlands, and elsewhere.
 9. For the history of the preparation of such instruments, see Natan Lerner, *supra* note 4, and *The UN Convention on the Elimination of all Forms of Racial Discrimination*, Second edition, Sijthoff and Noordhoff, 1980.

‘defamation of religion.’”¹⁰ Nevertheless, the nature of the group should not be an obstacle to granting its members the protection extended by Article 4 of the Convention on Racial Discrimination to victims of racial hatred or hostility. Victims of hatred or hostility on grounds of religion or belief are entitled to the same protection. In both cases, fundamental human rights are involved and victims are entitled to appropriate remedies.

“Defamation of religions” or even harsh, extreme criticism of a religious idea or doctrine is one thing. It is legitimate, unpleasant as it may be for adherents of that religion. But it is quite another matter when incitement results in violence, discrimination or hostility perpetrated against people on the basis of their religion or ethnicity. This is not legitimate. A religious individual, group, or community can be the object of defamation, and when such defamation carries social harm or negative consequences, as in the case of incitement against the group, there is room for legal action.

When the victims of incitement are members of a religious group or community, the rules contained in Article 4 of the CERD should be applicable by analogy. Had the General Assembly adopted a single instrument governing both race and religion (as it originally planned but, for political reasons, abandoned), the treaty would have protected every individual or group “against advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” according to Article 20(2) of the ICCPR.

When, in 1959-60, the attention of the UN was drawn to a series of antisemitic events, the General Assembly condemned “all manifestations and practices of racial, religious and national hatred...” In the discussion on the resolution, some states proposed adopting a convention on racial discrimination alone; other states favored adopting only a declaration; and still others pushed for a single instrument dealing with racial as well as religious discrimination. Finally, the General Assembly passed twin Resolutions, 1780 and 1781 (XVII), calling for the drafting of declarations and conventions dealing separately with race and with religion. While the documents on race were adopted swiftly, the Declaration on Religion was approved only in 1981 and the draft convention is still pending, apparently *sine die*.

The speed in the preparation of the instruments on race was due to the universal repudiation of racism, in addition to pressure by Third-World nations, and particularly the new African states. These states were not too interested in the protection of rights related to religion. For their part, communist states were rather hostile to such protection. Moreover, a political element – the friction related to the condition of Jews in the Soviet Union –

exacerbated the issue. A nasty expression of this friction was reflected during the discussion on including an article on antisemitism in the draft. The Soviet Union countered with an amendment condemning Zionism together with Nazism and neo-Nazism.¹¹

The fact that the Convention on Race does not refer to religion does not, however, preclude the application, by analogy, of relevant provisions to religion-related discrimination or intolerance. One year after the Convention on Race was adopted, the ICCPR was adopted, and its Article 20 deals with advocacy of both racial or religious (as well as national) hatred. Moreover, the Convention on Race strongly influenced subsequent developments. Its definition of discrimination and intolerance was followed in the Declaration on Religion, as well as in other texts against discrimination on other grounds. The wording of the Convention on Genocide, of instruments dealing with its denial, and with incitement against collectivities and individuals belonging to them, coupled with general legislation restricting freedom of expression when it affects fundamental liberties - all support the applicability by analogy of the Convention on Race to advocacy of religious hatred. The fact that victims belong to a racial or religious group should not lead to divergent treatment. Article 19 of the ICCPR speaks about “others.” Article III of the Genocide Convention does not distinguish between different motives of incitement. The European and American Conventions on Human Rights also refer to “others.” The 1990 Paris Charter for a New Europe urges combating “all forms of racial and ethnic hatred, anti-Semitism, xenophobia, and discrimination against anyone, as well as persecution on religious or ideological grounds.”

The General Comment 22 (48) adopted in 1993 by the Human Rights Committee¹² clearly determined that Article 20 of the ICCPR is fully compatible with freedom of expression and is applicable to racial and religious hatred.

10. See OHCHR expert workshops on the prohibition of incitement to national, racial or religious hatred, Expert workshop on Europe, 9-10 February 2011, Vienna, Joint submission by Special Rapporteurs Heiner Bielefeldt, Frank La Rue and Githu Muigai.

11. See, on this issue, Nathan Lerner *The U.N. Convention on the Elimination of all Forms of Racial Discrimination*, at 71(1980).

12. The General Comments of the Human Rights Committee are not mandatory decisions, as their name indicates; however, they reflect the collective experience of the Committee and may influence interpretation of the Covenant and relevant national legislation.

In an earlier General Comment, 11(19), the Committee declared that state parties are obliged to enact laws prohibiting advocacy of national, racial or religious hatred. Any distinction in the application of measures intended to protect individuals or communities from incitement to hatred seems to be wrong in principle.¹³

As indicated, incitement to hostility or hatred is the sphere in which legal difficulties are most frequently seen. Violence is adequately described in most criminal law systems, and discrimination is a clear-cut phenomenon properly defined in Article 1(1) of the Convention on Racial Discrimination, in terms followed more or less literally by most international texts dealing with discrimination. It refers broadly to any “distinction, exclusion, restriction or preference” based on the motive which is determined by the area covered by the instrument, namely race, religion, sex or any other quality protected by law, provided it has the “purpose” or “effect” of hurting the exercise, on an equalitarian footing, of the human rights so protected. The 1981 Declaration on Freedom of Religion or Belief created certain problems because of an inconsistent use of the terms “discrimination”, which has a precise legal meaning under human rights law, and “intolerance”, which does not, and is more related to notions such as “hostility” or “hatred” requiring clarification to facilitate a correct interpretation of Article 20 of the ICCPR.¹⁴

“Hatred”, “hostility”, “bias”¹⁵, “prejudice”, and “hate” are all notions belonging to the inner sphere and are of no interest to the law as long as they do not lead to conduct, behavior, or expression likely to have consequences the law has to prevent, avoid or, in some instances, repress or punish, as in the case of hate crimes, defined as “criminal acts with a bias motive.”¹⁶ Such expressions are those prohibited by Article 20 of the ICCPR and Article 4 of the ICERD. Some states with a rather strict tradition of freedom of speech or expression object to the limitations established by those provisions. Some have entered reservations to that effect when ratifying the respective treaties. There is an evident difference between the free-speech-oriented approach of the United States and the stance of European countries which have been strongly influenced by past totalitarian experiences. But even in the United States, there have been voices advocating the need for greater balance by limiting incitement, even when there is no clear and present threat of violence. Already in 1952, in a well known case, *Beauharnais v. Illinois*, the Supreme Court stated:

“Free speech is not an absolute right in all circumstances. It must be accommodated to other equally basic needs of society, one of which is

society’s interest in the avoidance of group hostility and group conflict.... Since society gains little or nothing by group defamation, its interest in avoiding the embitterment of group relations outweighs the abstract right of freedom of expression.”¹⁷

But, on the whole, the free-speech tradition is vigorously defended in the United States.

From an historical perspective, I would strongly argue that the lessons of the past, and not only of the past, lend greater weight to a restrictive than to a fundamentalist free-speech stand that ignores the range of speech that may be involved - from the simple issues involving “fighting words” to the tragic results of genocide in its different forms and degrees.

All agree that the basic rule is freedom of expression. This freedom is not absolute but it is of utmost importance as a basic human right in itself as well as for its instrumental role in ensuring the respect for all human rights. Article 19 of the ICCPR permits certain restrictions and should be read in conjunction with Article 20 of the Covenant. There should not be a difference in the treatment of incitement to national, racial or religious based hatred. Article 4 of CERD and Article III of the Convention on Genocide are both relevant. Anti-incitement legislation applies to groups in which ethnicity and religion overlap, as well as to victims – groups or individuals – belonging to only one of these categories.

It may be useful to underscore the relevance of Article 4 of the CERD. This article imposes upon states parties to the Convention the duty to adopt immediate and positive measures designed to eradicate incitement. States shall declare an “offence punishable by law” all

13. See paper submitted by the author as a member of the Expert Seminar appointed by the Office of the High Commissioner for Human Rights, U.N. GAOR Human Rights Council 10th Sess. U.N. doc. A/HRC/10/31/Add.3 (2009).

14. For the discussion of this issue as one as one that is not only semantic or terminological, see the book mentioned in note 4, pp. 89 ff.

15. “Bias” is the term that the authors of *Hate Crime Laws: A Practical Guide* OSCE/ODIHR (2009) prefer instead of “hate” or the above-mentioned terms. “Bias has a broader meaning than hate, and a bias motive only requires some form of prejudice on account of a personal characteristic” (see page 18).

16. *Ibid*, p.16.

17. *Beauharnais v. Illinois*, 343 U.S. 250 (1952), p. 256-257.

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 color or ethnic origin.” Why not also of another religion? Simply because it had been decided to separate the texts on race from those on religion. Clearly, if only one document on both evils had been adopted, religion would have been expressly mentioned. It would be unfair and illogical to omit groups based on religion or belief from the protection that international law grants to groups based on race or ethnic origin. The drafting history of the two instruments also does not sustain such an omission. Implementation of Article 4 of the CERD is obligatory and requires states to adopt domestic supplementary legislation.¹⁸ The use of analogy, particularly in the area of criminal law, has its complications and difficulties; but in the case of incitement, considerations of logic, the relevant legislative history and the appropriate principles of treaty interpretation – clearly tilt toward applying Article 4 of the CERD to incitement based on the victims’ religion or belief.

Article 20 of the ICCPR relates to incitement that leads to discrimination, hostility or violence. In the case of religion or belief that condition may be particularly difficult to ascertain. When does criticism of a religion become incitement? Such matters as motive, intent, *mens rea* and collective decision-making and its proof are involved. To understand the complexities, suffice it to recall the controversy surrounding the 2007 ICJ decision

in *Bosnia and Herzegovina v. Serbia and Montenegro* on Genocide.¹⁹ Nevertheless, the international community cannot afford to neglect its duty to establish when incitement becomes illegitimate and punishable.

As noted, freedom of expression is the general norm, but it is not an absolute right and is not listed as one of the rights from which there can be no derogation according to Article 4 of the ICCPR. States may, and should, limit freedom of expression when it is abused by the advocacy of national, racial or religious hatred that constitutes incitement to 1) discrimination, 2) hostility or 3) violence. Unfortunately, such abuses are generally committed by state organs or agents, and therefore the existence of a democratic regime where the rule of law is respected is a precondition, not always present. While discrimination and violence are easily identifiable phenomena, the same cannot be said about incitement to hostility, hatred, or similar evils. For their identification, it is necessary to entrust the matter to competent and independent judicial bodies or specialized institutions. ■

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18. See, *Study on the Implementation of Article 4* by Special Rapporteur Jose D. Ingles, U.N. Sales No. E.85.XIV.2 (1986).

19. *Bosnia and Herzegovina v. Serbia and Montenegro*, 2007 I.C.J.91 (February 26), at 140.

Religious Law and State Law: Collision or Coexistence?

Alberto M. Aronovitz*

Background

Traditionally, states rank their national legal sources according to a clear hierarchy: the constitution, followed by qualified or organic laws, ordinary laws, and lastly, regulations, ordinances, municipal legislation, jurisprudence, customs, *etc.* In this context, one of the most delicate problems currently emerging in Europe concerns the position that should be held by religious norms, traditions and customs (hereinafter: “religious norms” or “religious rules”) within each national legal system. Since in most modern countries, religious norms are not, *per se*, a recognized source of law, identifying the place where such norms should be set in the hierarchy of laws is a challenging task.

In order to approach the problem, a basic distinction must be established between legal systems where religious norms have been adopted by legislation and jurisdictions where that is not the case.

Jurisdictions where religious norms are adopted by legislation

It is a fact that in some states religious norms are applied in specific fields. In Israel, for instance, Section 2 of The Rabbinical Courts Jurisdiction (Marriage and Divorce) Law,¹ provides that marriage and divorce of Jews in Israel shall be celebrated “according to Jewish law”. In this case, religious law is applied not because Israel is a theocratic state but because the reference to Jewish law was introduced into the Israeli legal system by means of a legislative act of the Knesset. In other words, religious law was adopted in Israel through the channel, or through the filter, of parliamentary legislation.

When a state adopts a religious norm by means of legislation, the adopted norm becomes part of that state’s legal system - as is the case of any other legal norm. Consequently, the adopted religious norm must accommodate, interact, and be implemented in conjunction and in harmony with all the other existing legal norms. It is for that reason that some decisions of the Israeli Rabbinical, Moslem and other religious courts may be challenged before the Supreme Court, acting as the High

Court of Justice (HCJ). Israel’s HCJ may intervene whenever a religious court acts beyond its jurisdiction, when it infringes a law directly addressed at that instance, when the fundamental rights of one of the parties are violated, and when an equitable remedy is requested and there is no another court competent to grant it.² History shows that there have been many cases where the HCJ was called upon to intervene in judgments rendered by religious courts.³

Another feature of the interaction between religious rules and state law - this time at the institutional level - is that, in general, the salary of the judges sitting in religious courts is fixed by the State of Israel. For example, Section 20 of the Druze Religious Courts Law of 1962⁴ states that the remuneration of the Druze judges shall be established by decision of the Knesset.

These two examples illustrate how in Israel state law and religious norms interact, albeit sometimes in a stormy way.



* This article is based on a lecture given at the Lausanne Conference on “Religion in a Multicultural Society”, convened by the IAJLJ, October 30-Nov. 4, 2012.

1. The Rabbinical Courts Jurisdiction (Marriage and Divorce) Law of 1953 placed matters of marriage and divorce involving Jewish residents or nationals in Israel under the exclusive jurisdiction of Rabbinical courts which act in accordance with Jewish law: Jonathan Kaplan, *Religion and State*, available at [http://www.jewishagency.org/JewishAgency/English/Jewish+Education/Compelling+Content/Eye+on+Israel/Society/5\)+Religion+and+State.html](http://www.jewishagency.org/JewishAgency/English/Jewish+Education/Compelling+Content/Eye+on+Israel/Society/5)+Religion+and+State.html) (last visited March 28, 2013).
2. HCJ 8638/03 *Amir v. The Great Rabbinical Court in Jerusalem* (unpublished), available at NEVO database.
3. A recent example is HCJ 1247/12 *Anon. v. District Rabbinical Court of Tel-Aviv and others* (unpublished), available in Hebrew at <http://elyon1.court.gov.il/files/12/470/012/h06/12012470.h06.html> (last visited March 28, 2013).
4. Druze Religious Courts Law, 1962, available in Hebrew at <http://www.humanrights.org.il/articles/14court1.doc> (last visited 28 March, 2013).

Obviously, the need to reconcile religious norms with state law is not solely the concern of the State of Israel. Regarding marriage, for instance, some states recognize the validity of the forms and procedures prescribed by religious rules; however, the value attributed to marriages celebrated according to religious norms is not the same in every jurisdiction. This can be demonstrated in the following three examples:

Israel: here, marriages can be conducted in a form accepted by each recognized religious community (a religious authority acquires jurisdiction when both spouses belong to the same religious community). Therefore, as a general rule, Israel only recognizes the legal effects of religious marriages that are celebrated within its jurisdiction by the authorities of a recognized religious community.⁵

Switzerland: here, couples are allowed to celebrate religious marriage ceremonies but only after conducting a civil marriage before a Swiss civil authority.⁶ Under Swiss law only marriage celebrated before a civil officer has legal effect. Compared to Israel, this is a different form of “coexistence”, because in Switzerland religious marriages are only “tolerated” as a ritual ceremony.

Spain: here, the state signed agreements regulating the relations with the Moslem, Evangelical and Jewish communities.⁷ On the basis of these agreements, marriages celebrated according to the respective religious forms of these communities produce full legal effect. Therefore, in Spain, a person can celebrate a marriage following either the civil or the religious form but must confine himself to only one of these choices.

When drawing comparisons between Spain and Israel, it is possible to find some common points. For instance, in both Israel and Spain, the religious authorities cannot infringe state norms of a superior hierarchy. Thus, even if Moslem or Jewish laws permit marriage at a very young age, the Moslem and Jewish authorities in Spain are prevented from celebrating such marriages as they contravene the fundamental norms of marital capacity established by Spanish civil law. Similarly, Spanish Moslem authorities may not perform polygamous marriages.

From these examples it may be seen that Spain, Switzerland and Israel have adopted three different philosophies for the coexistence of state law and religious rules. In Israel, only the religious form of marriage is accepted, in Switzerland only civil marriage can produce legal effect, while in **Spain**, the future spouses may choose to conduct a civil marriage or marry in the form prescribed by their religion.

The place of religious rules that were not adopted by national legislation

In recent times, a new phenomenon has arisen. Due to the diversification of societies - so-called “multiculturalism”

- certain sections of the population have demanded the application of religious rules, traditions and customs in fields where parliaments have not incorporated these practices into national law. The demand for the application of religious norms relates to almost every area of life: from conception and birth to death, from abortion to euthanasia, from childhood and arranged marriages to polygamy and unilateral divorce, from praying during working hours to religious dress, from food to medical treatment, from religious symbols to the building of temples, from education to service in the Army, *etc.*, such diversity expands the risk of conflict with state law.⁸

The risk of conflict escalates with the proliferation of various “less institutionalized” religious and pseudo-religious movements. The Swiss Inter-Cantonal Centre of Information on Religions⁹ mentions Scientology, some esoteric groups, the Catholic Charismatic Renewal and diverse “healing groups” developed by mediums and

5. See, for example, Shahar Lifshitz, A Potential Lesson from the Israeli Experience for the American Same-Sex Marriage Debate, 22 *BYU J. Public L.*, 359 (2008), p. 361, available at www.law2.byu.edu/jpl/Vol22.2/Lifshitz.pdf (last visited 28 March, 2013).
6. The Swiss Civil Code, Art. 97.3: “The religious marriage cannot precede the civil marriage”.
7. *Ley 25/1992, de 10 de noviembre, por la que se aprueba el acuerdo de Cooperación del estado con la Federación de Comunidades Israelitas de España*; BOE n. 272 de 12/11/1992 pp. 38211-38214 available at http://noticias.juridicas.com/base_datos/Admin/l25-1992.html (last visited November 16, 2012); *Ley 24/1992, de 10 de noviembre, por la que se aprueba el Acuerdo de Cooperación del Estado con la Federación de Entidades Religiosas Evangélicas de España*, BOE n. 272 de 12/11/1992 pp 38209-28211, available at http://www.unav.es/ima/legislacion_prueba/eclesiastica/1992/1.html (last visited November 16, 2012); *Ley 26/1992, de 10 de noviembre, por la que se aprueba el Acuerdo de Cooperación del Estado con la Comisión Islámica de España*, BOE n. 272 de 12/11/1992 pp 38214-38217, available at <http://muslim.multiplexor.es/mas/ley-26-1992-11-10.pdf> (last visited November 16, 2012).
8. Silvio Ferrari and Sabrina Pastorelli, *The Public Space: The Formal and Substantive Neutrality of the Public Sphere*, available at <http://www.religareproject.eu/content/state-art-report-public-space-formal-and-substantive-neutrality-public-sphere> (last visited March 28, 2013).
9. *Centre intercantonal d'information sur les croyances*, available at <http://www.cic-info.ch/webquick/Pages/presentation/accueil> and <http://www.cic-info.ch/webquick/Pages/archives/accueil> (last visited November 16, 2012).

shamans as examples.¹⁰ Members of some of these movements which are not “officially recognized religions” may demand that their customs, traditions, norms and rituals be applied.¹¹ This being the case, one could ask: would a court recognize an employee’s sickness certificate issued by a tribal or traditional healer and not by a recognized physician? The answer to this question depends on the level of interaction between state law and religious norms in each particular legal system. In July 2012, the Labor Appeal Court of South Africa was faced with that question.¹² In that case an employee requested a 30 days unpaid holiday in order to participate in a healing therapy.¹³ For this purpose he produced a certificate delivered by a *Sangoma*, a type of traditional healer.¹⁴ The employer refused to accept this certificate and dismissed the employee. The court held the dismissal to be unfair, in light of the multicultural nature of South African society – a feature that is recognized by the South African Constitution.¹⁵ In its decision, the court stressed, *inter alia*, that those who do not subscribe to other people’s beliefs should not trivialize them, for example by equating absence from work for healing therapy, to absence from work for a karate course.

Demands to apply religious norms or traditions that might possibly collide with state law have also been raised by members of the so-called “traditional religions”. One example is the case of *Cha’are Shalom ve Tsedek v. France*, brought before the European Court of Human Rights (ECHR).¹⁶ The facts of this case are as follows:

Jewish ritual slaughter (*Shehita*) is regulated in France by means of a decree,¹⁷ Article 10 of which provides:

“It is forbidden to perform ritual slaughter save in a slaughterhouse. Subject to the provisions of the fourth paragraph of this Article, ritual slaughter may be performed only by slaughterers authorized for the purpose by religious bodies which have been approved by the Minister of Agriculture, on a proposal from the Minister of the Interior. Slaughterers must be able to show documentary proof of such authorization”.

On July 1, 1982, approval for Jewish slaughterers was granted to the “Joint Rabbinical Committee”, which is a part of the Jewish Consistorial Association of Paris. The body applying to the ECHR was an association aimed at, *inter alia*, “fostering observance of *kashrut*”. The applicant complained that it had been refused authorization by the French authorities to perform Jewish ritual slaughtering. As a result, the members of the Association who only ate

“*glatt kosher meat*” were obliged to procure their meat supplies from Belgium, or even perform ritual slaughter illegally. The respondent government produced a certificate from the Chief Rabbi of France to the effect that there were butchers’ shops supervised by the Consistory, where

10. *Centre intercantonal d’information sur les croyances*, Annual Report, 2011, p. 8, available at <http://www.cic-info.ch/webquick/Pages/archives/> (last visited November 16, 2012).
11. See, for example: *Quelles régulations pour les nouveaux mouvements religieux et les dérives sectaires dans l’Union européenne?* (Nathalie Luca, dir.), Aix-en Provence, Presses universitaires d’Aix-Marseille, 2011.
12. The Labour Appeal Court of South Africa, *Kievits Kroon Country Estate v Mmoledi & others* (JA 78/10) [2012] ZALAC 22, available at <http://www.saflii.org/za/cases/ZALAC/2012/22.html> (last visited March 28, 2013): “It would be disingenuous of anybody to deny that our society is characterized by a diversity of cultures, traditions and beliefs. That being the case, there will always be instances where these diverse cultural and traditional beliefs and practices create challenges within our society, the workplace being no exception. The Constitution of the country itself recognizes these rights and practices. It must be recognized that some of these cultural beliefs and practices are strongly held by those who subscribe in them and regard them as part of their lives”.
13. The certificate read as follows: “This serves to certify that XXXX was seen by me on 13-01-07 and was diagnosed to have PERMINISIONS OF ANCESTORS. He/She was under my treatment from 13 January to 8th July 2007. He/She will be ready to assume work on 8- 07-2007”. The letter is dated 31 May 2007 and bears the signature of a traditional healer.
14. The certificate stated: “This serves to certify that XXX was seen by me on 13-01-07 and was diagnosed to have PERMINISIONS OF ANCESTORS. He/She was under my treatment from 13-01 to 8th July 2007. He/She will be ready to assume work on 8-07-2007”.
15. The Constitution of the Republic of South Africa, No. 108 of 1996, Art. 31. Cultural, religious and linguistic communities. (l) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community- (a) to enjoy their culture, practice their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society”.
16. *Cha’are Shalom Ve Tsedek v. France* (Application no. 27417/95), Eur.Ct.H.R. (2000), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58738> (last visited March 28, 2013).
17. Decree no. 80-791 of 1 October 1980, promulgated to implement Article 276 of the Countryside Code, as amended by Decree no. 81-606 of 18 May 1981.

the members of the *Cha'are Shalom ve Tsedek* association could purchase meat complying with *glatt kosher* requirements. In its decision, the majority of judges of the ECHR found that the difference in treatment between the applicant Association and the Joint Rabbinical Committee – one of which had received the approval that the other was denied – pursued a legitimate aim, and that there was a reasonable proportionality between the means employed and the aim sought to be realized, *i.e.*, to regulate the conditions of animal slaughter.¹⁸ The court concluded that the members of the applicant Association could, if they wished, purchase *glatt kosher* meat imported from Belgium and that therefore their right to have access to food complying with their religious needs had not been violated by France. This is a clear example of the interaction in France between state law and religious norms, with respect to a recognized community.

Increasingly, courts in Europe are called upon to decide on matters relating to the relationship between state law and religious norms. In the absence of formal incorporation of religious norms into state law, how can the application of religious rules or traditions that are in conflict with state law be explained? The answer to this question depends on the particular type of conflict, which can be twofold: **one**, conflicts arising from situations created abroad and imported into the state; **two**, conflicts caused by situations created inside a given jurisdiction.

Situations imported from abroad

In considering the case of a Moslem man settling in Europe with two wives to whom he is legally married in his home country, would a European jurisdiction recognize both women as being legitimate wives? Or, would it only recognize one of the wives? And if so, which one would it be?

A Spanish court in Catalonia¹⁹ called upon to decide this matter, determined that the first wife was the legitimate one. The court based its decision on the rationale that Spanish public order (a principle that may prevent the recognition of a foreign legal status or the application of a foreign law conflicting with a basic principle of Spanish law) does not allow the recognition of polygamist marriages. Accordingly, the court held that the second marriage was invalid in Spain. Nonetheless, other Spanish courts have held differently.²⁰ For example, when a polygamist husband died, the question to be decided was which one of the two widows was entitled to the social security allowance? It was decided that only one pension should be paid and divided equally between the two widows.²¹ By adopting Solomon's wisdom, the Spanish judges recognized the validity of polygamist marriages legally performed abroad, thus applying a "mild" or "lax"

concept of the principle of public order.²²

The same reasoning was applied with respect to the legal effect in Spain of a *Talak*, the Moslem unilateral divorce. A court in Murcia²³ held that though unilateral divorce might impair the rights of the woman it did not mean that Spain would automatically reject all cases of *Talak*. For instance, if in a given case the divorce would be in the woman's interest (because her husband discriminated against her with respect to his other wife or because he made her life miserable), then, as in some French cases,²⁴ the exception of public order would not be strictly applied and the foreign divorce would be recognized. This reasoning applied on the understanding that the rights of the divorced woman would not be violated. This would be the position when

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18. *Ibid.*, Para. 77: "The Court, like the Government, considers that it is in the general interest to avoid unregulated slaughter carried out in conditions of doubtful hygiene, and that it is therefore preferable, if there is to be ritual slaughter, for it to be performed in slaughterhouses supervised by the public authorities. Accordingly, when in 1982 the state granted approval to the ACIP, an offshoot of the Central Consistory, which is the principal body representing the Jewish communities of France, it did not in any way infringe the freedom to manifest one's religion".
 19. Tribunal Superior de Justicia de Cataluña, (Sala de lo Social, Sentencia núm. 5255/2003 de 30 julio AS 2003\3049; in the same sense Dirección General de los Registros y del Notariado (Civil), Resolución de 27 octubre 1992 RJ 1992/9461.
 20. M^a Zabala, *La familia polígama y pensión de viudedad*, BIB 2005\721 Sentencias de TSJ y AP y otros Tribunales n^o 22/2004, Pamplona. 2005.
 21. Sentencia del Tribunal Superior de Justicia de Galicia, de 2 de abril de 2002 (AS 2002, 899).
 22. M^a Lourdes Labaca Zabala, *La familia polígama y pensión de viudedad*, *op. cit.*: "Despite the fact that it with our national law, when deciding disputes concerning widows' pensions of the concurrent wives of the polygamist the courts have decided in the majority of cases to apply the exception of conflicts public order in a flexible way" available at Westlaw.es; R. Mosteiro. *Sentencias de TSJ y AP y otros Tribunales n^o 19/2001 parte Comentario*, Pamplona. 2002, available at Westlaw.es.
 23. Audiencia Provincial de Murcia (Sección 1^a) Sentencia núm. 166/2003 de 12 mayo AC 2003/1676.
 24. *Civ. 1ère*, 3 novembre 1983, in *Rev. crit.* DIP 1984, p. 325, note Fadlallah, I. For a large comparative study on this matter see: *Le droit musulman de la famille et des successions à l'épreuve des ordres juridiques occidentaux, Étude de droit comparé sur les aspects de droit international privé liés à l'immigration des musulmans en Allemagne, en Angleterre, en France, en Espagne, en Italie et en Suisse*, Sami Aldeeb et Andrea Bonomi (ed.), Zürich, 1999, p. 149 ff.

the court or authority that intervened in the divorce was not biased, when the wife had a fair opportunity to be heard during the proceedings, when her economic and family rights were respected, *etc.*

These examples illustrate, in brief, the conflicts that may arise when a problematic situation is imported from abroad.

Situations created locally

A different case concerns problematic situations created inside a given jurisdiction. For instance, would Germany recognize the civil effect of a marriage celebrated in Munich according to the Roman tradition? Or would Italy allow Iranians to divorce by applying a law that discriminates against the wife?

This question arose in 1991²⁵ when a Milan court had to decide whether or not to apply Iranian law to the divorce of an Iranian couple residing in Italy. Art. 1133 of Iran's Civil Code provides: "A man may divorce his wife whenever he wishes to do so". The Italian court rejected the application of this provision, stating that it conflicted with the principle of equality of rights entrenched in the Italian Constitution. According to the court, unilateral divorce not only conflicted with the internal public order but also with the "international public order", *i.e.*, the general principles shared by Italy and other states regarding civilized community life. This far reaching decision contrasts with the view, in some cases, that the principle of public order should not be strictly and blindly applied, for example when the wife is interested in obtaining the divorce.

Recently, European states and their courts have been confronted by new challenges related to cases of incompatibility between religious norms and state law. Questions have arisen relating to women wearing Moslem headscarves at private (or public) workplaces;²⁶ the participation of Moslem girls in swimming and sports activities;²⁷ the display of religious symbols at work,²⁸ in public places, institutions and schools;²⁹ praying at the workplace and in the streets;³⁰ sexual mutilation of girls;³¹ growing beards and the workplace;³² eating foods complying with religious edicts at school and the workplace, *etc.*

Further, new points of friction are emerging, and there is the impression that some European states and institutions have found themselves in uncomfortable positions. In this context, European legislatures consider the following: would it be appropriate and constitutional to enact a law in order to criminalize the burka?³³ If so, how would such a law be applied in practice? More specifically, how would the authorities identify the person that was wearing the burka? And how would such a

prohibition affect the tourism industry in states frequented by tourists from the Gulf?

Should praying in public places be allowed or forbidden?

Would it be appropriate to statutorily ban the construction of minarets?³⁴

The recent decision rendered by a German court potentially outlawing religious circumcision, created a "serious concern" not only among some religious communities but also in hospitals and medical circles, including outside Germany.³⁵ Indeed, following the German decision, the Children's Hospital in Zurich discontinued circumcisions in order to "review its policies" though this interruption was stopped one month later. According to our experience in comparative law, it is quite unusual for a decision rendered by a court in one state

25. App. Milano, 17.12.1991, in RDIPP 1993, p. 109 ff., Trib. Milano, 24 March 1994, in RDIPP 1994, p. 853.

26. The RELIGARE project in its publication: *Religious Diversity and Secular Models in Europe: Innovative Approaches to Law and Policy* (May 2012, hereinafter: "RELIGARE") mentions the following cases: A female Muslim receptionist was dismissed for wearing a headscarf during work hours (Belgium: Antwerp Labour Court of Appeal, 23.12.11); a female Muslim doctoral researcher's financial stipend was withdrawn because she –as a civil servant- wore a headscarf when conducting research at the University (France: Administrative Court of Toulouse, 17 April 2009), available at <http://www.religareproject.eu/content/comparative-legal-study-addressing-religious-or-belief-discrimination-employment> (last visited March 28, 2013).

27. See, for example: "Une basketteuse doit choisir entre son voile islamique et le sport", available at <http://www.lesquotidiennes.com/soci%C3%A9t%C3%A9/une-basketteuse-priv%C3%A9e-de-son-voile-islamique.html> (last visited November 16, 2012).

28. A Christian airline check-in assistant was dismissed for wearing a necklace with a large crucifix when at work (the UK: *Eweida v. British Airways* [2010] EWCA Civ 80), in RELIGARE, *supra* note 26.

29. See, for example: *Lautsi v. Italy* (Application no 30814/06) Eur. Ct. H. R., (2009); *Tribunal Superior de Justicia de Castilla y León, Sala de lo Contencioso-administrativo, Sección tercera, Valladolid N° 47186 33 3 2009 0100806, Recurso de apelacion 0000257/2009 sobre educacion y universidades*, a comment is available at http://www.elpais.com/articulo/sociedad/Tribunal/Castilla/Leon/ordena/retirar/crucifijos/colegio/aulas/pidieron/padres/elpepusoc/20091214elpepusoc_11/Tes (last visited November 16, 2012).

to have such an immediate impact in another state. This might be understandable in the event of imminent danger to health (for example, cases of asbestos poisoning). It is difficult to identify such an “imminent danger” in a ritual practiced for more than 3000 years. The sole explanation is the level of concern and sensitivity felt in Europe regarding the relationship between state law and religious norms.³⁶

Using the relationship between state law and religious norms to stigmatize a religious community

A final aspect to be noted in this rather delicate context, concerns issues related to state law and religious norms which are diverted in order to promote agendas unrelated to the matter at hand. In this regard one may reflect on the recent proposal of the Norwegian “Ombudsman for Children’s Rights”, aimed at virtually reforming Jewish and Islamic circumcision norms. According to the proposal, Jews and Moslems should be compelled to replace male circumcision with a symbolic, nonsurgical ritual,³⁷ it was also proposed that the minimum age for circumcision be set at 15.

Following these developments, the Wiesenthal Centre recently launched a “Norway Watch Program”.³⁸ Indeed, it could be thought that proposals of this type attributed a unique and unbalanced weight to what some call the “integrity of children’s bodies”, whilst putting aside other related and important aspects. The German court’s decision has been criticized for failing to explain why circumcision is contrary to the child’s well-being.³⁹ On the other hand, the increasing evidence that circumcision may have a protective effect against HIV was not accorded any relevance.⁴⁰ Additionally, the prohibition on circumcision, or a fundamental change of its ritual nature, could damage parental authority, to a disproportionate degree.⁴¹ Lastly, an aspect that has not been sufficiently highlighted in the debate on circumcision is the implied consent of the person to be circumcised. In other words, the proposal to allow circumcision of adults only ignores the retroactive or prior consent of the person in question, as well as the consent of the child by proxy, through his parents. Indeed, circumcision performed eight days after birth causes no physical or psychological damage, nor does it leave memory of pain. On the other hand, circumcision at an adult age may entail health risks and, in some cases, lead to severe complications. These factors might well lead some adults to reject circumcision. When such proposals are raised, with the potential of denigrating a religious community, it is legitimate to ask whether the intention is really to preserve the so-called “child’s physical integrity”, or whether other unstated reasons play a role.

A further case where the debate on the interaction between state law and religious norms may be subjected to extraneous agendas concerns burials. In Switzerland, as in many other countries, the Jewish community has a long history of maintaining calm and low-key discussions with local authorities for the purpose of maintaining burial sites where Jewish traditions are respected. In most cases, satisfactory arrangements have been achieved. Recently, some Moslems have also asked for separate burial sites.

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30. Henry Samuel, “Praying in Paris streets outlawed”, *The Telegraph*, Sept. 15, 2011: “Praying in the streets of Paris is against the law starting Friday, after the Minister of the Interior warned that police would use force if Muslims, and those of any other faith, disobeyed the new rule to keep the French capital’s public spaces secular”.
 31. Swiss Criminal Code, Art. 124 (as modified in 2011 and in force since 1.7.12): “Female genital mutilation. 1) Any person who mutilates the genitals of a female person, impairs their natural function seriously and permanently or damages them in some other way shall be liable to a custodial sentence not exceeding ten years or to a monetary penalty of no less than 180 daily penalty units. 2) Any person who has committed the offence abroad but is now in Switzerland and is not extradited shall be liable to the foregoing penalties [...]”.
 32. A Sikh hotel employee was dismissed for wearing a turban and growing a beard (the Netherlands: *Kantonrechter Amsterdam* 24 January 1986), in RELIGARE, *supra* note 26, p. 4.
 33. This was the case in France: Loi n° 2010-1192 du 11 octobre 2010 *interdisant la dissimulation du visage dans l’espace public*, available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000022911670> (last visited November 12, 2012).
 34. Swiss Constitution, Art. 72, al. 3 (voted on the 29.11.2009): “The construction of minarets is forbidden”. For information in English see *The minaret ban hits the Swiss headlines* (Nov 30, 2009), available at http://www.swissinfo.ch/eng/top_news/The_minaret_ban_hits_the_Swiss_headlines.html?cid=7794388 (last visited March 28, 2013).
 35. This decision was strongly criticised, see for example Bijan Fateh-Moghadam, *Criminalizing male circumcision? Case Note: Landgericht Cologne, Judgment of 7.5.12 N° 151 Ns 169/11*, 13 German L. (2012), p. 1131.
 36. On 19.7.12, the German Parliament adopted a resolution asking the Government to provide a draft for legislation guaranteeing the right to circumcision to Jews and Moslems (translated by Bijan Fateh-Moghadam, *op. cit.*, p. 1131).

Naturally, this is a legitimate aspiration. However, some people have apparently taken advantage of the public debate that followed these requests in order to propose a complete and overall ban on religious cemeteries, arguing that they are discriminatory and violate the principle of equality.⁴² This is another example of a challenge to a practice that has functioned without issue over the ages.

Plainly, almost any ritual can be turned into a weapon to stigmatise the members of a religious community. A few years ago, there was a discussion in Switzerland concerning Jewish and Moslem laws pertaining to slaughtering animals for meat. On that occasion, criticisms of *Shehita* were voiced by animal rights activists. It is interesting to note that at the same time that some people were vehemently attacking *Shehita* for supposedly causing the animal much suffering (occasionally the critics even counted the seconds between the moment of the knife cut until the death of the animal), surprisingly very little was being said about hunting - a traditional practice in Switzerland. This being the case, is it not legitimate to ask whether an animal suffers more when it is slaughtered by *Shehita* or when it is targeted by a bullet fired from a distance of 45 metres or even from a longer range? This selective protection of animals casts, at minimum, a pall of suspicion around the real grounds underlying some of the attacks directed against *Shehita*.

The development of mass media and electronic communications makes the dissemination of these Trojan horses easy, to the extent that unaware persons could accept them as absolute truths. This poses a serious danger to the members of some religious communities. For example, on May 28, 2004, a woman from Geneva published a letter in the *Journal for the Protection of Animals* of the Canton of Vaud affirming, *inter alia*:

*Currently, fundamentalist Jews are preparing for the construction of their Third Temple in Jerusalem over the ruins of sites of Islamic saints because, they [the Jews] say, 'the Messiah will only come when the Third Temple is built'. And in order to purify that construction, they will use the ashes of a sacrificed red cow. In Israel there is even a farm for breeding these cows.*⁴³ (Translation from French by the author).

It took some effort to explain to the editors of the above-mentioned journal that the noble cause of protecting animals should not be taken hostage by people with political and discriminatory agendas, and that the donations given by the members of that association for the protection of animals should not be diverted from their cause towards this defamatory publication. Indeed,

for thousands of years there have not been red cows on earth, and today no one knows exactly what kind of animal was the so-called "red heifer".

Conclusion

The problem of accommodating religious norms to state law in European jurisdictions is multidimensional and, above all, far from being settled. These difficulties will seemingly increase in the future due to the ease of travel and ability to settle away from one's homeland, which in turn creates the phenomenon of multiculturalism; additionally, the rapid development of electronic communications allows persons living in one country to be exposed to religions, customs and rites from other corners of the world.

Only time will tell how the different European jurisdictions (many of them well-known for their general application of principles of "proportionality" and "fair balance") will cope with the problems posed by efforts to integrate religious norms, rituals and customs into their domestic systems. ■

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37. Replace circumcision with symbolic ritual, says Norwegian children's watchdog, circumcising boys violates their right to decide over their own body, says children's watchdog Dr. Anne Lindboe, available at <http://www.haaretz.com/jewish-world/jewish-world-news/replace-circumcision-with-symbolic-ritual-says-norwegian-children-s-watchdog-1.456443> (last visited March 30, 2013).
 38. Wiesenthal Center Launches Norway Watch: Leading Jewish NGO Confronts Country's Children's Ombudsman Over Anti-Circumcision Stance; State Secretary Commits - "(Milah) Ban Will Not Happen", September 9, 2012 <http://www.wiesenthal.com/site/apps/nlnet/content2.aspx?c=lsKWLbPJLnF&b=4441467&ct=12171353> (last visited March 28, 2013): "While acknowledging anti-Semitism in her country, and expressing concern over the bullying of Jewish children in schools, Dr. Lindboe refused to acknowledge that her position emboldens anti-Semites who denounce the age-old Jewish rite. Dr. Lindboe, a paediatrician whose mandate is to protect vulnerable children, also dismissed as "irrelevant" the growing body of scientific evidence of the medical benefits that circumcision provides males. The Ombudsman admitted she never witnessed a circumcision of a Jewish infant, but insisted that 'her opinion' arose out of her own experience".
 39. Bijan Fateh-Moghadam, *op. cit.*, p. 1135.

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40. WHO, Male circumcision for HIV prevention: “There is compelling evidence that male circumcision reduces the risk of heterosexually acquired HIV infection in men by approximately 60%”, available at <http://www.who.int/hiv/topics/malecircumcision/en/> (last visited 28 March, 2013).
41. *Ibid.*
42. Sami Aldeeb, *Les cimetières juifs et musulmans c’est encore une discrimination*, <http://echodelachouette.blog.tdg.ch/archive/2011/10/23/sami-aldeeb-les-cimetieres-juifs-et-musulmans-c-est-encore-u.html> see also <http://www.enquete-debat.fr/archives/sami-aldeeb-les-cimetieres-juifs-et-musulmans-cest-encore-une-discrimination> (last visited November 16, 2012); Sami Aldeeb, *Cimetière Musulman en Occident : Normes juives, chrétiennes et musulmanes* (2002), p.79 available at http://books.google.co.il/books?id=M2z_hd2DDdYC&pg=PA168&lpg=PA168&dq=S.+Aldeeb,+Cimeti%C3%A8re+Musulman+en+Occident,+Normes+juives,+chr%C3%A9tiennes+et+musulmanes&source=bl&ots=Eogj06tnZK&sig=nHCHxzR64tzgxsuVeB4_hl7ZPzE&hl=fr&sa=X&ei=5U6mUN2GBcLatAaMqoDYDA&ved=0CCUQ6AEwAw (last visited March 28, 2013).
43. *Courrier des Bêtes* Avril 2004 n° 398, p. 12.

Law and Religion in Germany - Current Developments

Gerhard Robbers*

Currently, in Germany, three main practical issues can be identified in the field of law and religion which relate to Jewish life: male child circumcision, ritual slaughter and the wearing of religious garments. It is remarkable that all three issues have arisen in the Islamic religious context.

Male Circumcision of Minors

1. The Criminal Court's decision

On 7 May 2012, the District Court of Cologne handed down a controversial judgment in criminal proceedings instituted against a Muslim medical doctor who had performed a religious circumcision on a four year old boy at the request of the boy's parents.¹ The court held that the religious circumcision of a minor was a violation of the boy's right to physical integrity and could not be justified by the right of the parents to decide on the religious upbringing of their child. Notwithstanding that the court decided that the doctor had performed an unjustified bodily injury according to § 223 of the Criminal Code it acquitted the accused for lack of guilt: According to the court, the doctor had not been in a position to be aware of the illegality of his action, because consensual male religious circumcision had not previously been regarded as a punishable crime. This decision has become final.

Because the court acquitted the accused no further appeal or constitutional complaint against the judgment was made. One may speculate whether the verdict deliberately sought to achieve this result. Indeed, the accused did not lodge an appeal against the decision; however, it is quite likely that the Federal Constitutional Court would have held a constitutional complaint admissible because of the specific circumstances; the medical doctor would only have needed to indicate that he wanted to perform further male child circumcisions in the future and thus declare a legal interest in a constitutional court decision in the matter.

While the judgment has no binding force on other courts, it has caused much concern especially in Muslim and Jewish quarters; deplorably, a considerable portion of the German public has welcomed the court's decision.

2. Errors in the judgment

The judgment was legally wrong in several respects. First and foremost, the judgment did not even mention the child's own right to be raised in its religion. The court only considered the right of the child to physical integrity. It thus confined the child's welfare to questions of the body. The ideas of culture, spirituality, belonging to a set of people or to a community were not mentioned in the judges' reasoning.

The judgment took a view that in German legal academic writing only a few authors had assumed that male child circumcision should be regarded as inflicting unjustified bodily harm on the child. The vast majority of authors had not made this assumption nor had any court in the past held this opinion.

It could well be argued that a religiously motivated male child circumcision does not even meet the Criminal Code criteria that would make it a bodily injury. In the German criminal law context and in the view of the constitution the norm requires a specific legal disapproval of the act; it would be fair to assume that such legal disapproval does not exist here. It should be noted that this provision of the Criminal Code together with its predecessors has existed for well over 150 years; at no time has religious circumcision been held to be a violation of the norm; the provision does not aim to make circumcision a crime; religious circumcision of a male child is socially acceptable.

However, the majority view in German criminal law doctrine holds that male child religious circumcision does meet the factual criteria of punishable bodily injury, although it is justified by the religious motives of the



* This lecture was given during the panel on "A Comparative Approach to Religion and State Law" in the Lausanne Conference.

1. *Landgericht Köln WA 151 Ns 169/11*, http://www.justiz.nrw.de/nrwe/lgs/koeln/lg_koeln/j2012/151_Ns_169_11_Urteil_20120507.html.

parents. Yet, it is not only the parents' right to decide on the religious upbringing of the child which is at stake. The problem underlying not only the District's Court verdict but also the general public debate is that major aspects of the issue have simply not been considered or that their relevance has been denied. It is not only or even predominantly the right of the parents to decide on the religious upbringing of the child that is relevant.

What is at stake is not balancing the rights of the child against the rights of the parents. The issue is a full understanding of the range of the rights of the child. It is the right of the child itself to be raised in its religion and its right to have a religion that is at stake. The child has a right to develop its personality in all dimensions of life. The child has a right to be part of the religion, tradition and culture of its parents and this must not be denied. Some years ago the German Federal Constitutional Court held that belonging to a culture is part of human dignity.² The Jewish child has a right to be raised in Jewish rites, in Jewish tradition, in Jewish religion. The international instruments on child protection strongly protect the right of the child to be raised in its own religion;³ the same applies to general human rights instruments such as the European Convention on Human Rights, the UN International Convention on Civil and Political Rights and several others. Germany, the USA, Israel or Muslim states would certainly not have signed these treaties had they prohibited male child circumcision - a key cultural and religious act that has been performed for thousands of years. German criminal courts are obligated to take into account these treaties when applying German criminal law.

Public debate in Germany has only debated the right of the child to physical integrity. Child welfare is wrongly reduced to issues of the body; the mind is ignored. It is highly unfortunate that even the major child protection associations in Germany have made this mistake and thus undermined child welfare in its full sense. Public debate overstates the physical side of the matter; it disregards the spiritual and cultural side. In addition to anti-Muslim and antisemitic approaches, a general anti-religious feeling is at work. Religious sensibilities are held to have no weight; the body, physical beauty is cherished. When the freedom of religion of the child was part of the debate the dominant view was that the circumcision should wait until the person had reached maturity; thus religion was made an issue for adults or at least grown-ups, alone.

It should be recalled that what is also at stake is the integration of citizens within a multi-religious and multicultural society. This is a task set by the German constitution that declares Germany to be a social state, part of the European Union, endorsing international

understanding and protecting human rights. If sections of the population are not to be allowed to meet their own legitimate religious duties, this constitutional duty would be violated. Moreover, the preamble to the German constitution states: "Conscious of their responsibility before God and humankind...". This responsibility refers to the Holocaust and it encompasses the Jewish as well as the Muslim idea of God. It is inconceivable that after the Holocaust German courts should assume that they must protect Jewish children against being Jewish.

3. The legislature's solution

The major problem with this judgment is not the decision *per se* which could easily have been overruled by higher courts. The major problem with the judgment is the public reaction it received. A large section of the population applauded it. Anti-Muslim feelings and a short-sighted concept of child protection took a united front. Antisemitic sentiments surfaced again and many people either chose not to remember the German past or declared it irrelevant in this context. Because of the conviction that children had to be protected against bodily harm and the infliction of pain, antisemitic and anti-Muslim feelings could hide behind a wall of ostensible righteousness.

In contrast, the relevant political class immediately concluded that male child circumcision had to remain legal in Germany. The same view was held by the leading representatives of the religious communities. On the other hand, there were many within all the political parties as well as within the Christian religious communities who engaged in the intense debate on the issue advocating a prohibition on male child circumcision.

Soon after the judgment of the Cologne District Court, several German federal state governments such as those of Bavaria and North Rhine-Westphalia advised their criminal prosecutors to refrain from bringing the traditional male child circumcision before the courts and thus retain the previous procedure.

As a result of the public debate and in particular the international aspects of the matter, the German government introduced a bill in parliament according to which male child circumcision performed medically correctly and with the consent of the parents was explicitly lawful. The bill introduced a new § 1631d BGB⁴ and was passed into law quickly.

The law amended the Civil Code stating that the parents had a right to have their male child circumcised without

2. BVerfGE 76,1.

3. Article 14 Convention on the Rights of the Child.

4. BGB = *Bürgerliches Gesetzbuch* = Civil Code.

medical indication provided the circumcision was performed according to medical standards. Adequately trained religious personnel would continue to have the right to perform this traditional religious practice.

The law reads:

§ 1631d BGB

Circumcision of the male child

(1) Custody also includes the right to consent to a medically not necessary circumcision of a male child who is not capable of discernment or discrimination, provided this is to be performed according to the rules of medical art. This does not apply if, taking into account its purpose, the circumcision endangers the child's welfare.

(2) Within the first six months of the child's birth, persons appointed by a religious community for this purpose, may also perform circumcisions according to subsection 1, if they are specially trained for this activity and are, without being a medical doctor, equally capable of performing the circumcision.⁵

The legislature avoided connecting legal child circumcision to religious motivations. The courts will therefore not have to investigate the religious convictions of the parties, thereby safeguarding the state's neutrality in religious matters.

Public debate on the issue has died down since the introduction of this law but the underlying currents remain.

Ritual Slaughter

Animal protection has been the subject of a long running public debate. This debate touches upon some religious communities' need for ritual slaughter. There is a certain amount of pressure to make ritual slaughter – *i.e.* slaughtering the animal without first stunning it - more difficult or banning it altogether.

Currently, ritual slaughter is legal under certain conditions according to § 4a of the Animal Protection Act.⁶ The provision reads:⁷

“(1) A warm-blooded animal may only be slaughtered if it has been stunned before the beginning of the blood withdrawal.

(2) Notwithstanding subsection 1 no stunning is needed, if...

1....

2. the competent state authority has granted an exceptional permit for slaughtering without stunning ...; the exceptional permit may only be granted by it, in so far as is necessary to meet the needs of members of a specific religious community within ... [Germany] who are obliged to ritually slaughter or otherwise refrain from consuming meat of animals which have not

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5. Norm introduced by the *Gesetz über den Umfang der Personensorge bei einer Beschneidung des männlichen Kindes* [= Law on the Range of Care about Persons at a Circumcision of the Male Child of 20.12.2012] (BGBl. [= Bundesgesetzblatt = Federal Law Journal] I S. [= Seite = page] 2749 with effect of 28.12.2012). Translation by the author. The original German text reads:

§ 1631d BGB Beschneidung des männlichen Kindes

(1) Die Personensorge umfasst auch das Recht, in eine medizinisch nicht erforderliche Beschneidung des nicht einsichts- und urteilsfähigen männlichen Kindes einzuwilligen, wenn diese nach den Regeln der ärztlichen Kunst durchgeführt werden soll. Dies gilt nicht, wenn durch die Beschneidung auch unter Berücksichtigung ihres Zwecks das Kindeswohl gefährdet wird.

(2) In den ersten sechs Monaten nach der Geburt des Kindes dürfen auch von einer Religionsgesellschaft dazu vorgesehene Personen Beschneidungen gemäß Absatz 1 durchführen, wenn sie dafür besonders ausgebildet und, ohne Arzt zu sein, für die Durchführung der Beschneidung vergleichbar befähigt sind.

6. 4a Abs. 2 Tierschutzgesetz [Animal Protection Act] of 24.07.1972, as published on 18 May 2006 (BGBl. I S. 1206,1313, last amended by Article 20 of the Law of 9 December 2010 (BGBl. I S. 1934).

7. Translation by the author. The original German text reads:
§ 4a

(1) Ein warmblütiges Tier darf nur geschlachtet werden, wenn es vor Beginn des Blutentzugs betäubt worden ist.

(2) Abweichend von Absatz 1 bedarf es keiner Betäubung, wenn...

2. die zuständige Behörde eine Ausnahmegenehmigung für ein Schlachten ohne Betäubung (Schächten) erteilt hat; sie darf die Ausnahmegenehmigung nur insoweit erteilen, als es erforderlich ist, den Bedürfnissen von Angehörigen bestimmter Religionsgemeinschaften im Geltungsbereich dieses Gesetzes zu entsprechen, denen zwingende Vorschriften ihrer Religionsgemeinschaft das Schächten vorschreiben oder den Genuss von Fleisch nicht geschächteter Tiere untersagen oder

....

3.

been ritually slaughtered, in accordance with mandatory norms of their religious community... ”.

State authorities are often reluctant to grant such permits. While the Federal Constitutional Court held the provision of the Animal Protection Act and ritual slaughter *per se* to be constitutional,⁸ the Bundesrat (Federal Council) has initiated a bill which would make obtaining an exceptional permit for ritual slaughter much more difficult than it is even today. The bill would introduce an amendment to the Animal Protection Act providing that the exceptional permit must only be granted if the applicant proves that ritual slaughter without stunning does not inflict more pain or suffering to the animal than slaughtering with prior stunning. It can be argued that such proof may well be impossible to provide because of lack of reliable scientific methods in this field. Even if such methods should exist, it would be practically impossible for an applicant to provide such evidence, because the proof is excessively expensive. It has therefore been argued that the bill, if passed into law, would only be constitutional, if the relevant state authorities do not apply strict standards regarding such evidence. Given the current restrictive practice of state authorities in the field, this, however, seems to be an unrealistic expectation.

Meanwhile, the Bundestag and Bundesrat have passed an amendment to the Animal Protection Act which does not include the bill initiated by the Bundesrat on ritual slaughter. Public pressure by animal protection NGOs against ritual slaughter,⁹ however, continues.

Religious Garments

Another matter relevant to religious life in Germany is that of wearing religious garments. The debate in this regard started with the Muslim headscarf; the consequences thereof have reached the *kippa* [skullcap].

It should be noted that in Germany, Muslim girls may wear the headscarf in public schools, universities and other public places. In private employment, the employer has to accept the headscarf. The Federal Labor Court has held that a Muslim employee in a perfume shop may wear her religiously motivated headscarf against the will of her employer.¹⁰

The situation in public office is more complicated.

A number of federal states (Baden-Wuerttemberg, Hessen, Bremen, Berlin, Lower Saxony, Bavaria, North Rhine-Westphalia, and the Saarland) have introduced laws that ban specific religious garments worn by teachers in public schools. This relates particularly to Muslim garments.¹¹

In the other federal states (Rhineland-Palatinate,

Brandenburg, Mecklenburg-Western Pomerania, Schleswig-Holstein, Hamburg, Saxony, Saxony-Anhalt, Thuringia) and in the Federal Republic as such, no such specific prohibitions exist.

Some of the federal states have tried to avoid banning Christian and Jewish garments, and have focused only on Muslim symbols. These states have introduced provisions which exclude Christian and ‘occidental’ symbols from the ban; this obviously raises questions of equal treatment and non-discrimination.¹²

Some other federal states (Berlin, Bremen) have prohibited public officials from wearing religious garments while in office. This, in theory, would render it possible - after the expulsion of Jews from public office in 1933 and the Holocaust - to exclude an orthodox Jew from public office because he insists on wearing the *kippa* in office. It has to be assumed that this, in fact, would be unconstitutional, although this issue has not been tested by the courts.

This edict has already had practical consequences for a Jewish policeman in Berlin. The policeman was on duty preserving public order during a demonstration against the Cologne Criminal Court’s verdict against child circumcision. Demonstrators remonstrated with the

8. *BVerfG Urteil* of 15.01.2002 - 1 BvR 1783/ 99.

9. See also § 12 *Tierschutz-Schlachtverordnung* (BGBl I 2012, 2982) and Article 4 Regulation (EC) No. 1099/2009 of 24 September 2009 (ABl. L 303 of 18.11.2009, p. 1).

10. *BAG Urteil vom* 10.10.2002 - 2 AZR 472/ 01.

11. See also *BVerfG* 24 Sep. 2003, *BVerfGE* 108, 282 *et seq.*

12. The law of Baden-Württemberg, to give one example, provides that teachers at public schools are not allowed to exercise political, religious, ideological or similar manifestations that may endanger or disturb the neutrality of the state towards pupils or parents or the political, religious, or ideological peace of the school. Particularly illegitimate is behavior that can appear to pupils and parents to be a teacher’s demonstration against human dignity, non-discrimination, the rights to freedom, or the free and democratic order of the constitution. Exercising the task of education according to the Land’s constitutional provisions – and the respective exhibition of Christian and occidental educational and cultural values or traditions – does not contradict the duty of behavior according to the School Act. The duty of religious neutrality does not apply within the religious instruction provided in accordance with Article 18 sentence 1 of the constitution of the Land Baden-Wuerttemberg. (§ 38 section 1 sentence 4 School Act of Baden-Württemberg [*Schulgesetz für Baden-Württemberg*]).

policemen that he, as a Jew should be in favor of the demonstration, and he in turn put on his *kippa*. The policeman is now facing disciplinary measures because of his behavior though it appears that the authorities are dropping the allegation of violation of the prohibition on wearing a religious garment. The authorities seem to regard the wearing of a *kippa* to be an expression of a personal opinion and they are basing their procedures on the question of whether the policeman had expressed a private opinion in a setting in which he should have been neutral, like any other policeman keeping the peace in a demonstration.

Conclusion

The above developments are relevant to, but not directed

against, Jewish life in Germany. It is resentment against Islam and Muslim immigration that apparently underlies these developments. However, attacks on one religion very often amount to attacks on all religions. Another underlying feature of these developments is that in some quarters of public opinion resentment is felt against religion *per se*. Since once again religion matters, anti-religious sentiments have become harsher. While neither feature focuses on Jewish life, each has had an impact on the German population in terms of forgetfulness: forgetfulness of a chapter in German history that should have had a deeper impact on the current debate about law and religion. ■

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Is the FFM all about facts?

Tom Gal

January 31, 2013 - 11:00 (Geneva time): After investigating the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territories, including East Jerusalem, the independent international fact-finding mission (hereinafter “FFM”), submitted its report. Although the narrow mandate given to the FFM led to a well-founded assumption that the report would criticize Israel’s policy in the Occupied Territories and East Jerusalem (hereinafter “OPT”), the outcome was nonetheless surprising. This article does not criticize the FFM report for its final conclusion stating that Israel’s policy is illegal, nor for the well-known fact that the FFM submitted its report even though it had not obtained the cooperation of the government of Israel, rather, the article criticizes the FFM for the way it chose to use the information before it, its disregard of crucial material and failure to encourage the efforts of national bodies and civil societies. In order to understand the criticism expressed in this article, first one must examine the general role of Fact Finding Missions, then, identify the mandate given them, and third examine how the FFM used and interpreted the given information. This article will refer to one flaw in the FFM report – the way it undermines and weakens national organs.



information relating to a situation of human rights or humanitarian concern, by means of which it is determined whether or not the relevant international normative framework has been violated [...]’.⁴ Thus, fact-finding missions are expected to report more than the facts alone, they are expected to draw initial conclusions as to possible violations committed by the party under investigation. Generally, one should be aware of the challenges an international fact-finding mission faces. Usually, fact-finding missions operate in areas of conflict where establishing facts and identifying victims and perpetrators of violence is difficult. Moreover, fact-finding missions are usually faced with the non-cooperation of the state under investigation, which in turn criticizes and discredits the report for being “incomplete”. Thus, it would not be appropriate to rigorously scrutinize the conclusions of the missions.⁵ Finally, ‘while recognizing that FFMs do not provide a judicial standard of scrutiny, they must make sure that their findings are credible and accurately reflect the behaviour of the parties under scrutiny’.⁶

Fact-finding missions aim at identifying facts that give rise to legal conclusions, the results often lead to further inquiries both nationally and internationally.⁷ Thus, after the Goldstone report on the Gaza conflict, Israel started its own investigation of the alleged violations of

Fact-Finding Missions – aims, purposes and standards

In December 1991 the United Nations Security Council adopted the UN General Assembly declaration on “Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security”.¹ The General Assembly declaration defines a “fact finding” activity as: ‘any activity designed to obtain detailed knowledge of the relevant facts of any dispute or situation which the competent United Nations organs need in order to exercise effectively their functions [...]’.² The declaration also requires that: ‘[t]he report should be limited to a presentation of findings of a factual nature’.³

Recently, the concept of a fact-finding mission has been defined as ‘[referring] to predominately *ad hoc* investigative mechanisms tasked with ascertaining relevant facts and

1. U.N. SCOR, 46/59, 9 December 1991 U.N. Doc. A/RES/46/59. Can be found at - <http://www.un.org/documents/ga/res/46/a46r059.html> (consulted 28 February 2013).
2. *Ibid.*, para. 2 of the Annex.
3. *Ibid.*, para. 17.
4. Stephen Wilkinson, “Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions”, *The Geneva Academy of Humanitarian Law and Human Rights* (2012), p. 11.
5. *Ibid.*, para. 13.
6. *Ibid.*
7. Thomas M. Franck & Scott H. Fairley, “Procedural Due Process in Human Rights Fact Finding by International Agencies”, *Am.J.Intl.L.* 308-345(1980).

international humanitarian law and the Libyan Commission of Inquiry resulted in the referral to the International Criminal Court. Consequently, it may be seen that fact-finding missions have far-reaching effects and may strengthen not only international mechanisms but also national mechanisms and respect for the rule of law. This conclusion stems from the fact that fact-finding missions aim to reflect all aspects of the party under investigation in order to provide a sound factual background as well as a well-founded legal analysis of alleged violations. It is argued here that a fact-finding mission, which not only makes statements on the alleged violations and wrongful acts committed by the state but also describes positive acts, may influence the state and national actors in the state.

The FFM and the report

The Council established the FFM in March 2012.⁸ The FFM's mandate was described as follows: 'to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem, with a mandate ending on submission of a report to the Council'.⁹ Israel decided not to cooperate with the FFM;¹⁰ moreover, the adoption of Resolution 19/17 resulted in a complete Israeli boycott of the Council, including its UPR process.¹¹ Due to the lack of cooperation, the FFM issued a public call for written submissions.¹² According to the FFM itself, it had received 62 submissions from different sources.¹³ According to the FFM all were reviewed and analyzed carefully to assess their credibility. The FFM framed the applicable law on the matter referring to both human rights law as well as international humanitarian law provisions (mainly Article 49 of the 1949 Fourth Geneva Convention).

To begin with it is wise to point out a few problematic terms and notions within the report. First, the FFM used the term "settlements" for all structures beyond the 'Green Line'. These structures include Jewish villages and also *inter alia*: checkpoints, the security barrier ('the Wall'), tunnels, permit systems and other obstacles.¹⁴ The author does not dispute the fact that the settlement policy was included in the FFM's mandate. However, the items included by the FFM within the term 'settlements' had the effect of expanding the reach of this term, and consequently the reach of the FFM mandate. Reviewing the legality and impact of the items included within the term 'settlements' led to an analysis of the 'occupation' itself as opposed to an analysis of the Jewish villages in the OPT. Indeed, one may claim that the administration of the OPT is managed in such a way as to facilitate the lives of those inhabiting the Jewish villages; however,

such claims and linkage between the two should not be assumed but proven. As for the 'security barrier' itself, the International Court of Justice ('ICJ') has reviewed its legality within both contexts separately: its use as a self-defence mechanism and as a tool to facilitate and enable further Jewish settlements in the OPT.¹⁵

The FFM found it useful and important to mention the different categories of settlers residing in the OPT,¹⁶ those motivated by the 'quality of life' there, those belonging to the 'Ultra-Orthodox' Jewish community and those who are motivated by political ideals. Indeed, these categories differ from one another in many respects; however, assuming that the basic legal ground for the illegality of the settlements, as expressed in the report, is the prohibition mentioned in Article 49 of the 1949 Fourth Geneva Convention, such categorization is obsolete. It is true that the various motives described above might each have a different impact on the Palestinians residing in the area; nonetheless, like the legal ground for illegality,

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8. U.N. GAOR Human Rights Council 19th Sess, 53th mtg. Res. 19/17 'Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan' U.N. Doc. A/HRC/RES/19/17 March 22, 2012). See more at: <http://unispal.un.org/UNISPAL.NSF/0/04FF85F46E9EFD8B85257A00004C5AD2#sthash.NjiZ5pfc.dpuf> (last consulted 28.02.2013).
 9. *Ibid*, para. 9.
 10. U.N. GAOR, Hum. Rts. Council 'Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural right of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem U.N. Doc. A/HRC/22/63 (February 7, 2013, advanced unedited version released January 31, 2013), para. 7 can be found at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-63_en.pdf (last consulted 28 February 2013).
 11. Nick Cumming-Bruce, "Israel Skips U.N. Review on Rights, a New Move" *New York Times*, January 29, 2013, can be found at http://www.nytimes.com/2013/01/30/world/europe/israel-to-boycott-un-human-rights-review.html?_r=0 (last consulted 28 February 2013).
 12. The FFM report, *supra* note 10, para. 6.
 13. *Ibid*
 14. *Ibid*, para. 4.
 15. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136. The ICJ found that the construction of the 'Wall' was illegal in both contexts.

such categorization is irrelevant (and in my opinion may actually undermine the FFM general conclusion of illegality).

Did they ignore facts?

The International Association of Jewish Lawyers and Jurists ('IAJLJ') submission was one of 62 submitted to the FFM. This submission included 3 briefs.¹⁷ None of these briefs was directed at legitimizing the settlements as such, rather they were intended to clarify notions and terms as well as provide a broader perspective of the issues. The briefs included an in-depth review of the judicial process in Israel, especially in regard to the human rights of Palestinians in the OPT as well as the law enforcement system operating in the area. These briefs also tried to draw a line between the pure 'military necessity' and 'security measures' needed (and provided by law) for the protection of civilians, and those actions that might be deemed unlawful. The briefs provided facts on the judicial process available to Palestinians residing in the OPT. For example: Palestinians residing in Gaza (from which Israel withdrew more than 7 years ago) may submit petitions to the Israeli High Court of Justice ('HCJ'). Moreover, the HCJ has deliberated on issues that are considered in most judicial systems to be 'off-limits' due to their political aspects. Additionally, the HCJ has cancelled restrictions on Palestinians travelling on Highway 443 despite the principle of 'military necessity', all in the name of 'freedom of movement'.¹⁸ The briefs are filled with many similar examples.

The report failed to mention any of the information provided in these briefs, information that would have been valuable for the assessment and understanding of all the implications of the settlements in the OPT. While it is disturbing for those preparing these briefs to have had their work ignored, this is not the main point. The issue is not whether or not an NGO (or other civil society organ) was mentioned in the FFM report, but whether crucial (and credible) information was excluded. Not only was the information we provided credible (as it was based on published HCJ judgments) it was crucial for assessing how and to what extent Palestinian rights have been infringed and what, if any, reparations have been made for such infringements. While it seems that access to the HCJ has increased dramatically in the past three decades, particularly for Palestinians, the FFM did not find it necessary to include this vital fact in its report, nor did the FFM find it relevant to mention HCJ judgments that remain in effect, despite being heavily criticized by the Israeli public. Further, although the FFM mentioned both the Sasson report (2005) and the Levy report (2012) it did not find it relevant to review the significance of the

existence of these reports *per se* – i.e. the fact that in recent years both the Israeli government and society have found the settlement issue significant enough to request a legal analysis (regardless of whether the conclusions of these reports would be adopted).

Conclusion – what is the outcome of ignorance?

As discussed earlier, not presenting these facts (the IAJLJ briefs as well as other reports) was a critical failure on the part of the FFM. Ignorance of the facts has an impact on both the FFM and Israeli society. I believe that by failing to mention the information included in the briefs the FFM failed twice: first, it did not comply with its mandate or exercise the necessary scrutiny thereby endangering future cooperation with similar missions; and second, it undermined both the role of national civil society and the Israeli judicial system (particularly, the HCJ). In other words, had the FFM referred to the relevant facts in the IAJLJ briefs it would have encouraged this NGO (and perhaps eventually the Israeli government) to continue to cooperate with similar missions, knowing that all the facts and information would be taken into account. More importantly, by referring to these facts and acknowledging the role of the HCJ, the FFM would have strengthened the court and its role in Israeli society as the protector of human rights and emphasized the importance of a strong judicial system in general. Relating to these facts and strengthening the HCJ and civil society would not have changed the final outcome of the FFM report, namely, that the settlements are illegal according to international law; however, it would have enabled those fighting for the protection of human rights to receive positive reinforcement while pursuing their chosen path. Unfortunately, the FFM took on the role of the prosecutor, searching only for incriminating evidence. ■

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The full statement may be seen at the IAJLJ website: www.intjewishlawyers.org

16. The FFM report, *supra* note10, para 19.

17. Submission of the briefs was made 14 November 2012.

18. HCJ (High Court of Justice) 2150/07 *Abu Safiyeh v. Minister of Defense* (Dec. 29, 2009). Available in English at: http://elyon1.court.gov.il/files_eng/07/500/021/m19/07021500.m19.pdf.

The Iranian Four-Fold Threat: What Is It? What Can Be Done?

Irwin Cotler*

While the world has been focused – and understandably so – on Iran’s nuclear program, this myopic preoccupation ignores and marginalizes the totality of Iran’s four-fold threat. Simply put, we are witnessing in Ahmadinejad’s Iran the toxic convergence of four distinct – yet interrelated – dangers – the nuclear threat; the genocidal incitement threat; state-sponsored terrorism; and, the systematic and widespread violations of the rights of the Iranian people.

Indeed, Ahmadinejad’s Iran – a term used to distinguish the regime from the people and publics of Iran who are themselves the targets of massive domestic repression – has emerged as a clear and present danger to international peace and security, to regional and Mid-East stability, and increasingly – and alarmingly so – to its own people.

We must not only sound the alarm on this critical four-fold mass of threat, but we must invoke and pursue the corresponding remedies – both political and juridical – which exist to hold Iran accountable for its actions in each of these domains.

The Nuclear Threat: Denial, Deception and Delay What is it?

Iranian Supreme Leader Ali Khamenei’s refrain that “Our motto is nuclear energy for all and nuclear weapons for none”¹ is in stark contrast to the most recent report of the International Atomic Energy Agency, released on November 16, 2012.² The report concludes that Iran has been engaging in activities that are “strong indicators of possible nuclear weapons development”³ – such as conducting hydrodynamic experiments in a containment vessel at the Parchin military complex near Tehran – while denying IAEA inspectors access to critical sites and information. In other words, Iran’s nuclear program in violation of international law is progressing with abandon.

As a Wall Street Journal article co-authored by a former IAEA inspector explains, “Crucially, Iran continues to stockpile uranium enriched to 3.5% and 20% purity—levels for which Iran has no immediate use unless it is planning to

make an atomic bomb ... Judging from this report, Iran seems determined to achieve the capability of producing nuclear materials suitable for nuclear weapons”⁴.

Negotiations were resumed in Kazakhstan in February 2013. However, while one may hope that negotiations may be the answer, experience demonstrates that such negotiations benefit Iran alone and are part of a comprehensive Iranian strategy. As negotiations continue, uranium enrichment is accelerated, the centrifuges spin, and Tehran approaches “breakthrough” capacity for nuclear weaponization, the whole in line with an Iranian strategy of using negotiations as a means for advancing uranium enrichment and the nuclear weaponization program itself.

That this, in fact, may be Iranian strategy was revealed by the Iranians themselves on the eve of the Baghdad negotiations on May 14, 2012 where Hamidreza Taraghi, an adviser to Supreme Leader Ayatollah Ali Khamenei close to the Iranian negotiating team, summed up Tehran’s “successes” during negotiations as follows: Western countries did not want Iran to have a nuclear power plant, but its Bushehr reactor was now connected to the national grid.⁵



* This article continues from and updates an earlier article written by the author on “Combating the Iranian four-fold threat” published in *JUSTICE*, 48 ed., Winter 2011, p. 42.

1. “Iran Leader Rules Out Nuclear Bomb, Will Pursue Energy”, *Reuters*, Aug. 30, 2012.
2. International Atomic Energy Agency, Implementation of the NPT Safeguards Agreement and Relevant Provisions of Security Council Resolutions in the Islamic Republic of Iran, Nov. 16, 2012.
3. *Ibid.*, p. 10.
4. Olli Heinonen, and Simon Henderson, “What We Know About Iran’s Nukes”, *Wall St. J.*, Sept. 6, 2012.
5. Thomas Erdbrink, “Iran Sees Success in Stalling on Nuclear Issue”, *N. Y. Times*. May 14, 2012.

Simply put, Taraghi and other Iranian officials concluded that their policy of stalling by means of negotiation “forced the United States to accept Iranian enrichment,” and in effect, the related nuclear program.⁶

Several years ago, Iranian negotiator Hassan Rowhani elaborated on this strategy: “While we were talking with the Europeans in Tehran, we were installing equipment in parts of the facility in Isfahan.” Rowhani added, “In fact, by creating a calm environment, we were able to complete the work on Isfahan.”⁷

Indeed, just as with Isfahan, Iran laid the groundwork for its secret Fordow plant – uncovered by the West in 2009 – at the same time as the regime was offering to return to negotiations in 2006.

Ultimately, not only is the delay of negotiations a tactical move by Iran, but the negotiations themselves are a tactic, part and parcel of the comprehensive Iranian 3-D strategy of denial, deception and delay: denial of any nuclear weaponization program to begin with, deception as to the depth and breadth of that program, and delay, delay, delay!

The Nuclear Threat: Denial, Deception and Delay What can be done?

There are a series of specific actions that Iran must take – and be verified as taking – if it is to comply with its international legal obligations. Among these actions, which should serve as a benchmark for effective negotiations, are the following:

1. Iran must abide by, and fully implement, its obligations under Security Council resolutions and the Nuclear Non-Proliferation Treaty.

Iranian compliance should not be seen as a “concession” for which the West must necessarily reward Iran, but rather a set of obligations that Iran must independently adhere to and comply with. Simply put, there is no Iranian “right to enrich,” the most recent of the Iranian negotiating mantras.⁸

2. Iran must – as a threshold requirement – verifiably suspend its uranium enrichment program, so as to counter the Iranian strategy of delay, or buying time for a nuclear breakthrough. Indeed, as the head of the British Secret Intelligence, Sir John Sawers, has warned, if the Iranian enrichment program is not suspended, Iran is likely to have a nuclear bomb by 2014, with all the consequences relevant thereto.⁹

3. Iran must ship its supply of enriched uranium out of the country where it can be reprocessed and made available to Iran, under appropriate inspection and monitoring, for use in its civil nuclear program.

4. Iran must verifiably close – and dismantle – its nuclear enrichment plant at Fordow, embedded in a mountain

near Qom, the existence of which Iran had initially denied. Otherwise, Iranian enrichment at Fordow will enter the zone of impenetrability rendering it closed to inspection and immune from any military strike.¹⁰

5. Iran must suspend its heavy water production facilities at Arak. It is sometimes forgotten that heavy water is an essential component for producing plutonium, which is the nuclear component North Korea used to build its own nuclear weapon. Simply put, the path to nuclear weaponization need not be traveled by uranium enrichment alone, and the suspending of uranium enrichment, however necessary, will not alone result in Iran verifiably abandoning its nuclear weaponization program.

6. Iran must allow IAEA inspectors immediate and unfettered access to any suspected nuclear sites. Indeed, as a signatory to the Nuclear Non-Proliferation Treaty, Iran is bound by its obligations not to pursue nuclear weapons and to open its nuclear sites and installation.

7. Iran must provide a substantive response to the IAEA’s request for information about the ten additional uranium enrichment sites that Iranian authorities announced – even boasted about – in 2009 and 2010.

8. Iran must provide the IAEA with access not only to sites, but also to personnel, documentation, and other information regarding its nuclear program that Iran is currently concealing. Again, one should not ignore that Iran’s nuclear weaponization program has continued to advance against the backdrop of the three Ds of denial, deception, and delay. For example, in 2007 and 2010 Iran continued to conceal its nuclear activities by not informing the IAEA of its decision to build a new nuclear plant at Denkhovia, or the additional enrichment facility, the aforementioned Fordow Fuel Enrichment Plant. Therefore, the need for inspection – and verification – is crucial.

9. Iranian authorities need to grant the IAEA access to the Parchin site. Although the IAEA and others have concluded that activity related to nuclear weapons development has very likely occurred at the site¹¹, Iranian authorities have repeatedly denied access to the IAEA,

6. *Ibid.*

7. Elaine Sciolino, “Showdown at U.N.? Iran Seems Calm”, *N. Y. Times*, March 14, 2006.

8. Peter S. Green, “Iran Says It Has ‘Inalienable Right’ to Enrich Uranium”, *Bloomberg*, June 29, 2012.

9. Christopher Hope, “MI6 chief Sir John Sawers: ‘We Foiled Iranian Nuclear Weapons Bid’”, *The Telegraph*, July 12, 2012.

10. *Supra* note 2, p.5-6.

11. *Ibid.*, p. 10.

including refusing such visits in January and February 2012, while dismissing the IAEA information as a set of “forgeries.”¹² Moreover, Yukiya Amano, the IAEA chief, has called access to Parchin a “priority,” citing also the sanitization of the site – and possible removal of incriminating evidence of weaponization – since the IAEA first informed Iran that it knew of the site’s existence.¹³

This might explain information that emerged to the effect that the Iranians were prepared to grant access to Parchin. Interestingly enough, Iran is already being credited for this “concession,”¹⁴ which its alleged sanitization – and cover-up of the evidence – would have made far less meaningful in any case.

10. Iran needs to allow the IAEA to install devices on centrifuges for the monitoring of uranium enrichment levels. Otherwise, Iran could move to weapons grade uranium even if it were using only low-enriched uranium, by increasing both the number and the speed of the centrifuges.

11. As Senators Joe Lieberman, John McCain and Lindsey Graham put it in a Wall Street Journal article in early 2012, there needs to be an additional agreement respecting “intrusive inspections based on the Additional Protocol under the Nuclear Non-Proliferation Treaty to ensure the Iranians aren’t lying or cheating about the full scope of their program, as they have in the past.”¹⁵

12. Negotiations should not ignore, marginalize or be allowed to sanitize Iran’s massive domestic repression, or provide cover for their continuance. When the US negotiated an arms control agreement with the Soviet Union, it did not turn a blind eye to the USSR’s human rights abuses. Indeed, the Helsinki Final Act linked the security, economic and human rights baskets. Negotiations with Iran should do no less.

13. Nor should the negotiators ignore Iran’s ongoing state-sanctioned incitement to hate and genocide, a standing violation of the Genocide Convention. Simply put, Iran has already committed the crime of incitement to genocide prohibited under international law and should be called to account to cease and desist from such incitement, and its perpetrators brought to justice.

In summary, given the Iranian 3-D pattern of denial, deception and delay, as uranium continues to be enriched and centrifuges continue to spin – and as the nuclear weaponization program is on the verge of what experts have termed a “breakthrough”¹⁶ – only a verifiable abandonment by Iran of its nuclear weapons pursuits will suffice.

For that objective to be secured, negotiations must not be a cover for the three Ds, but a password to full Iranian compliance with their international obligations, and a benchmark for international peace and security.

The Threat of Genocidal Incitement

What is it?

We have been witness of late to a critical mass of Iranian state-sanctioned incitement to hate and genocide – the crime whose name we should even shudder to mention – without parallel or precedent even by Iran’s wanton international criminality. As an all-party parliamentary committee of the Canadian Parliament put it, “*The Iranian leadership’s inflammatory rhetoric constitutes incitement to genocide, in violation of the prohibition against incitement in Article 3 of the Genocide Convention*”¹⁷ – and it is all the more ominous as this incitement is the terrifying and vilifying context in which Iran’s nuclear weaponization is being accelerated.

This genocidal incitement has included – in August 2012 alone – President Ahmadinejad’s call to “*remove the Zionist black stain from the human society,*” adding that “*the very existence of Israel is an insult to humankind and an affront to all world nations,*” and requiring the wiping out of this “*scarlet letter from the... forehead of humanity*”.¹⁸

Earlier in August, Ahmadinejad had — in a speech to ambassadors of Islamic countries in advance of Quds Day that was also published on his website — declared that “*anyone who loves freedom and justice must strive for the annihilation of the Zionist regime in order to pave the way for world justice and freedom.*”¹⁹ Similar incendiary statements proceeded from Supreme Leader Ayatollah Khamenei, yet again, speaking of Israel as “*cancerous tumor*” that

12. Rao Prashant, “IAEA Says Iran Clean-Up of Parchin Site ‘Ongoing’”, *AFP*, Nov. 11 2012.

13. Zoltan Simon, “IAEA access to Iran military complex a priority, Amano says”, *Bloomberg*. June 21, 2012.

14. Joe Klein, “Iran Nuke Concession?” *Time*, May 22, 2012.

15. Lindsey Graham, Joseph I. Lieberman and John McCain, “Getting a Good Deal With Iran”, *The Wall Street Journal*, May 22, 2012.

16. George Jahn, “Iran Ready to Ramp Up Nuke Program”, *AP*, Nov. 15, 2012.

17. Canada House of Comm., Ahmadinejad’s Iran: A Threat To Peace, Human Rights and International Law: Report of the Standing Committee on Foreign Affairs and International Development, Subcommittee On International Human Rights, 40th Parliament, 3rd Session (2010), available at <http://www.parl.gc.ca/content/hoc/Committee/403/FAAE/Reports/RP4835870/faaerp03/faaerp03-e.pdf> (last visited March 31, 2013).

18. “Quds Day Will Remove ‘Zionist Black Stain’”, *PressTV*, Aug. 19, 2012.

19. Joanna Paraszczuk, “Ahmadinejad: World Forces Must Annihilate Israel”, *The Jerusalem Post*, Sept. 2, 2012.

must be “annihilated.”²⁰

Moreover, these cruel and incendiary statements from the Iranian leadership have been comingled and conflated with ugly anti-Semitic hate, including classical anti-Semitic tropes blaming the Jews for the poisoning of the wells “these past 400 years,” adding that “the Zionists have been inflicting very heavy damage and suffering on the whole of humanity for over 2,000 years, especially over the last four centuries.”²¹

Indeed, this state-sanctioned culture of hate and incitement to genocide has been persistent, pervasive, and pernicious. The twenty-first century began with Khamenei calling for the annihilation of the Jewish state. It was followed by the parading in the streets of Tehran of a Shahab-3 missile draped in the emblem “Wipe Israel off the map, as the Imam says.”²² It has continued with the use of epidemiological metaphors referring to Jews as “filthy bacteria,”²³ and Israel as “a cancer that must be removed,”²⁴ reminiscent of the Nazis calling the Jews “vermin” and the Rwandan Hutus calling the Tutsis “cockroaches,” the whole as prologue to and justification for a genocide foretold.

In particular, this genocidal incitement began to intensify and escalate in 2012, with the website of Supreme Leader Ali Khamenei declaring in February that there is religious “justification to kill all the Jews and annihilate Israel, and Iran must take the helm.”²⁵ Former Spanish Prime Minister José Maria Aznar disclosed in May that the supreme leader of Iran warned him that Israel was a “cancer” and must be “burned to the ground and made to disappear from the face of the Earth.”²⁶ Several days later, the chief of staff of the Iranian Armed Forces, Major General Hassan Firouzabadi, declared: “The Iranian nation is standing for its cause — that is the full annihilation of Israel,” implicating unfairly the people of Iran — otherwise the targets of mass Iranian domestic repression — in the statements of its leaders.²⁷ The Iranian regime’s criminal incitement has been long documented; yet, not one state party to the Genocide Convention has undertaken any of its mandated responsibilities to prevent and punish such incitement — an appalling example of the international community as bystander — reminding us also that genocide occurred not only because of cultures of hate, but because of crimes of indifference.

The Threat of Genocidal Incitement What can be done?

Mandated remedies exist under international law to combat such incitement and include the following measures:

Calling upon United Nations Secretary-General Ban Ki-moon to refer this genocidal incitement to the Security Council pursuant to Article 99 of the Charter of the United

Nations, on the basis that Iran poses a threat to international peace and security; initiating an inter-State complaint by a Party to the Genocide Convention pursuant to its Article 9, calling Iran to account for its violations of the Convention, including its failure to act to prevent genocide and its failure to punish the incitements to genocide perpetrated by its officials; calling upon State Parties to the Genocide Convention pursuant to their responsibilities under Article 1 and the prohibition against incitement to genocide in Article 3, to petition the United Nations Security Council to take such action as it deems appropriate to hold Iran to account so as to prevent the genocide that Iran threatens to carry out against another nation; and, inviting the United Nations Security Council to consider referring to the Prosecutor of the International Criminal Court the case of Ahmadinejad and those Iranian leaders participating with him in direct and public incitement to genocide, for investigation of prospective prosecution.

Simply put, this panoply of juridical remedies — which have brought about the indictment of seemingly immune dictatorial leaders — should be added to the existing political, diplomatic, and economic initiatives invoked to sanction Iran.

Silence is not an option when states threaten genocide — especially when they, like Iran, are on the verge of acquiring nuclear weapons and even boast that they can thereby bring about a holocaust “in a matter of minutes.”²⁸

20. Greg Tepper, “Israel a ‘Cancerous Tumour’ and Middle East’s Biggest Problem, Iranian Supreme Leader Says”, *The Times of Israel*, Aug. 19, 2012.
21. “Ahmadinejad: Zionist Regime, a Tool to Dominate Middle East”, *Islamic Republic News Agency*, Aug. 17, 2012.
22. Mary Jordan and Karl Vick, “World Leaders Condemn Iranian’s Call to ‘Wipe Israel Off the Map’”, *The Washington Post*, Oct. 28, 2005.
23. Michal Lando, “Ahmadinejad: Israel ‘Filthy Bacteria’”, *The Jerusalem Post*, Feb. 20, 2008.
24. “Iran Vows to Hit Any Country that Stages Attack”, *The Times of Israel*, Feb. 5, 2012.
25. Clifford D. May, “Diplomacy has run its course”, *USA Today*, Aug. 20, 2012.
26. “Khamenei Told Me That Israel Must Be Burned to the Ground”, *Israel Hayom*, May 17, 2012.
27. “PM Says Iran’s Chief of Staff Vowed Sunday to Eliminate Israel”, *The Times of Israel*, May 21, 2012.
28. Raphael Ahren, “Arresting Ahmadinejad in New York for Inciting Genocide? It’s Just Not Going to Happen, Says Israeli Official”, *The Times of Israel*, Sept. 24, 2012.

Condemnation has not served as an effective deterrent, nor will it sanction Iranian incitement. The time for action is now.

The Threat of State Sponsorship of International Terrorism

What is it?

The suicide bombing of an airport tourist bus in the Bulgarian city of Burgas – which killed five Israelis and the Bulgarian bus driver, and injured dozens more – was but the latest in a series of major terrorist assaults against Israeli and Jewish targets in 2012 alone. Thankfully, most of these attacks were thwarted without serious casualties, but all reflect a common pattern: the lethal convergence of Hezbollah operatives and Iranian instructions.

Moreover, in an eerie but revealing coincidence, the Burgas attack took place on the 18th anniversary of the 1994 bombing of the Jewish Cultural Centre in Argentina (AMIA), in which 87 people were murdered and more than 300 wounded. Argentinean authorities determined that it was carried out by Hezbollah – operating at the behest of Iran²⁹ – with enormous implications for the present Iranian-Hezbollah wave of terror that has engaged five continents and 24 countries in the last two years alone, reminding us of the annual US State Department's Country Report on Terrorism, which lists Iran as *"the most active state sponsor of terrorism."*³⁰

Moreover, as a result of the Argentinean investigation into the AMIA bombing, INTERPOL issued Red Notices against several Iranian nationals, none of whom have been brought to justice. Indeed, some have been rewarded for their criminality, such as Ahmad Vahidi, the former head of the Iranian Revolutionary Guard Corps Al-Kuds Force, who was named Minister of Defense in Iran by President Ahmadinejad, and who is responsible for overseeing its nuclear program.³¹ The Argentinean terrorist bombing presaged the increasing, and compelling, evidence of Iranian footprints in a series of recent aborted terrorist attacks in 2012 – spanning five continents – and including countries such as Kenya, Turkey, Cyprus, India, Georgia, Azerbaijan, Singapore, and the US.

What is more, the Iranian Revolutionary Guard Corps has been at the forefront of a long-standing global campaign of terror against perceived opponents of the regime. The Iran Human Rights Documentation Center has linked senior regime officials to the extrajudicial murder of at least 162 political activists in 18 countries from East Asia through Western Europe to the United States. In a particularly brazen incident, Iranian agents assassinated four Kurdish activists at a Berlin restaurant in 1992. A Berlin court concluded that *"Iran's political leadership ordered the crime."*³²

By its ongoing and escalating state-sponsored terror on foreign soil, Iran is in standing violation of every canon of domestic and international law.

The Threat of State-Sponsorship of International Terrorism

What can be done?

Accordingly, given the clear and compelling evidence of the escalating Iranian state sponsorship of international terrorism – and the increasing targeting of diplomats – the question arises: What then, can the international community do to combat this dangerous wave of international terror, sometimes sanitized by the reference to "soft countries" and "soft targets"? More particularly, what must the international community do to not only combat this wave of terror, but hold the perpetrators to account, lest a culture of impunity continue to encourage the terrorism itself?

First, all states have the responsibility to invoke the legal, diplomatic, economic and political instruments at their disposal to confront Iranian terrorist aggression. These instruments include, but are certainly not limited to, increasing bilateral and multilateral diplomatic and economic sanctions; the mobilization of political pressure to isolate the Iranian regime as a pariah among the nations; the naming and shaming of the Iranian perpetrators and their Hezbollah proxies to combat plausible Iranian deniability of their culpability; and the bringing of these perpetrators to justice.

Second, and more specifically, state parties to the Genocide Convention should initiate interstate complaints before the International Court of Justice (ICJ) against Iran – also a state party to the Genocide Convention – for its incitement to genocide, a standing violation of the Convention.

Third, states must hold Iran accountable for its attacks against diplomats, pursuant to the Islamic Republic's obligations under Article 13 of the Convention on the Prevention and Punishment of Crimes against

29. "Iran Charged over Argentina Bomb", *BBC*, Oct. 25 2006.

30. *Country Reports on Terrorism 2011*, US Department of State, July 2012, p. 12.

31. Aidan Jones, "Ahmadinejad Chooses Wanted Man for Cabinet", *The Guardian*, Aug. 22, 2009.

32. "Murder at Mykonos: Anatomy of a Political Assassination", Iran Human Rights Documentation Center, 2007, available at <http://www.iranhrc.org/english/publications/reports/3150-murder-at-mykonos-anatomy-of-a-political-assassination.html#UIVgMQhz-F8o> (last visited March 31, 2013).

Internationally Protected Persons, including Diplomatic Agents, which it ratified in 1978.

Hezbollah and its proxies must be held to account through increased and enhanced sanctions, blacklisting and the like. Indeed, pressure must be placed on the EU to finally blacklist the terror group, as Canada and others have done.

Fourth, the international community should invoke the panoply of legal remedies against the Iranian regime and its terrorist agents, including: states should list the Iranian Revolutionary Guard Corps, an organization that has been at the vanguard of the Islamic Republic's campaign of state terrorism, as a terrorist entity; the Argentinean judiciary's decision – and resulting Interpol arrest warrants – should be enforced; civil suits should be instituted where appropriate against Iran and its terrorist agents for its perpetration of acts of terror; and, the principle of universal jurisdiction should be invoked to hold Iran's leaders – under indictment for war crimes and crimes against humanity – accountable.

Fifth, Hezbollah and its proxies must be held to account through increased and enhanced sanctions, blacklisting and the like. Indeed, pressure must be placed on the EU to finally blacklist the terror group, as Canada and others have done.

Sixth, Israel – as the leading target for this Iranian wave of terror – should be included in anti-terror cooperation discussions and international forums, such as the recently established US-sponsored Global Counter-Terrorism Forum. It is shocking that Israel was excluded from such a forum given not only the horror of its experience, but the extent of its anti-terror expertise. Indeed, global security and cooperation efforts must include Israel if they are to be effective and successful for all concerned.

Simply put, the recent wave of terrorist attacks must serve as a wake-up call for the necessary action to be taken by the international community to combat this culture of incitement, terror and impunity. Indeed, history teaches us that a sustained and coordinated international response is required to combat such grave threats to international peace and security. We must act now to hold Iran's state-sanctioned terror to account, lest more lives be lost. Such Iranian state-sanctioned terror is a chilling warning of what dangers await the international community should Iran become a nuclear power.

Massive Domestic Repression of Human Rights

What is it?

As the US State Department puts it in its most recent report on human rights in Iran, *“The most egregious human rights problems were the government's severe limitations on citizens' right to peacefully change their government through*

free and fair elections, restrictions on civil liberties, and disregard for the sanctity of life through the government's use of arbitrary detention, torture, and deprivation of life without due process”.³³

Indeed, Iran curtails freedoms of speech, press, and assembly and has even engaged in extrajudicial killings. On October 11, 2012, Ahmed Shaheed, the UN Special Rapporteur on Human Rights in Iran, reported that, during the first half of 2012, the government carried out at least 141 executions that it acknowledges while a further 82 were carried out in secret. Fifty-three executions occurred in May alone. Many of those sentenced to death by the regime were convicted without a fair trial and often for crimes such as consuming alcohol and drug trafficking.³⁴ This is hardly surprising given that Iran has consistently led the world in number of executions per capita and the execution of minors.

Shaheed's report also confirmed that journalists, bloggers and teachers are constantly under surveillance while others are arrested and persecuted without justifiable cause, including prominent human rights lawyers, Mohammad Ali Dadkhah and Nasrin Sotoudeh. Furthermore, there is a persistent and pervasive assault on women's rights and on religious and ethnic minorities, particularly the Baha'i and the Kurds. Many of those detained are often subjected to physical or psychological torture, including mock hangings, electrocution, rape, sleep deprivation and threats against family members. In general, Shaheed called the human rights situation *“deeply troubling”*.³⁵

Yet, regrettably, this massive human rights crisis has been eclipsed and ignored given the focus on the Iranian nuclear program.

The Threat of Massive Domestic Repression

What can be done?

Simply put, we must expose, unmask, and hold Iran accountable for its massive domestic repression, which has prompted the establishment of the Inter-Parliamentary Group for Human Rights in Iran, an international consortium of parliamentarians from all over the world

33. *Country Reports on Human Rights Practices for 2011*. Bureau of Democracy, Human Rights, and Labor. United States Department of State. 2012 available at <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper> (last visited March 31, 2013).

34. Report of the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran. Office of the High Commissioner for Human Rights. United Nations. 2012.

35. *Ibid.*, p.22.

that I co-chair with US Senator Mark Kirk.

Our group has initiated the Iranian Political Prisoner Advocacy Group, calling on parliamentarians internationally to “adopt” a political prisoner and create a critical mass of advocacy on behalf of these prisoners of conscience.

Indeed, we must call for the immediate and unconditional release of all prisoners of conscience — those detained for doing nothing other than exercising their internationally recognized rights under law, and including even under domestic Iranian law. Equally, we should call upon Iran to establish an immediate moratorium on executions, while working toward the complete abolition of the death penalty.

Also, we should call on the Iranian authorities to grant the UN Special Rapporteur on Human Rights in Iran access to the country, while implementing their undertakings to receive visits by UN human rights bodies to ensure Iranian compliance with international human rights treaties to which it is a state party. Indeed, in preparing his 2012 report, the Special Rapporteur was once again denied entry to Iran on the grounds that he is a “US agent.”³⁶

Moreover, all states can and should redouble their efforts to support dissidents directly by funding programs to help activists mobilize and circumvent electronic barriers. In addition, we must put pressure on satellite companies that carry Iranian state television, as the Iranian authorities use their airways not only for the spreading of propaganda, but for televising of coerced confessions and show trials. We must ensure that communications technology and service providers are not used for the advancement of the regime’s goals to the detriment of the Iranian people.

While the world is understandably focused on the threat posed by the Iranian nuclear weaponization program, we cannot abandon the people of Iran, who are themselves the targets and victims of the Iranian regime’s massive assault on human rights. We must champion their case and cause, let them know that the world is watching, that they are not alone, and that we stand in solidarity with them.

Conclusion

As demonstrated above, we are witnessing in Ahmadinejad’s Iran the toxic convergence of four distinct – yet interrelated – dangers: the nuclear threat; the genocidal incitement threat; state-sponsored terrorism; and the systematic and widespread violations of the rights of the Iranian people.

This critical four-fold mass of threat must be combated with a critical mass of remedy, and let there be no mistake about it: remedies exist and indeed mandated under international law. Iran must be held to account for its actions in each of these domains lest it continue to be a clear and present danger to international peace and security, to regional and Mid-East stability, and increasingly – and alarmingly so – to its own people. ■

Irwin Cotler is the Member of Parliament for Mount Royal, first elected in November 1999. He is a former Minister of Justice and Attorney General of Canada (2003-2006) and is Professor of Law Emeritus at McGill University where he taught law for 30 years.

36. *UN rights rapporteur, US agent: Iran MP*, PressTV, March 10, 2012, available at <http://www.presstv.ir/detail/230968.html> (last visited March 31, 2013).



הארגון הבינלאומי של עורכי-דין ומשפטים יהודים (ע"ר)
THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS (I.A.J.)

January 30, 2013

Mr. Minister of Foreign Affairs, Lic Héctor TIMERMAN

Mr. Minister of Justice and Human Rights, Dr. Julio ALAK

Mr. Chief Justice of the Supreme Court of Justice of the Nation, Dr. Ricardo LORENZETTI

Via: Embassy of Argentina to Israel

Your Excellencies,

RE: Joint Commission with Iran to Investigate the Terrorist Attack on the AMIA

The International Association of Jewish Lawyers and Jurists (IAJLJ) is shocked to learn of Argentina's decision to sign a Memorandum of Understanding creating a joint commission with the Republic of Iran to investigate the horrendous terror attack on the AMIA building in 1994.

Knowing the painstaking legal measures taken to prosecute those responsible for the disappearance of thousands of people in Argentina despite the lapse of many years and being acquainted with the voluminous report issued in 2006 following thorough investigations, it is difficult to comprehend how the above agreement could now be reached in respect of the AMIA bombing when it is well-known who was responsible for this attack, to the extent that Interpol has even issued warrants for the arrest of the perpetrators.

We, as an international organization of lawyers and jurists are dismayed by the difference in approach taken by the Argentinian authorities and judiciary in the case of the terrorist attack on the AMIA. Accordingly, we join those international voices calling for the revocation of the agreement and urge the Argentinian government to take the necessary steps to arrest those responsible, using every means available under international law.

Yours sincerely,

Irit Kohn, President

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THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS (R.A.)

NGO: IAJLJ - The International Association of Jewish Lawyers and Jurists
Representative delivering the statement: Adv. Tom Gal

Human Rights Council 22nd Session, 19 March 2013 Item 9 – General Debate

Thank you Mr. President,

We are recently witnessing the ongoing use of the "Protocols of the Elders of Zion" in some Arab and Muslim countries, with the aim of demonizing Jews and inciting against the State of Israel. It is a well-established fact that this is a fraudulent document that has been proclaimed as such by well known historians, authors and journalists, the courts of law in various countries and even the Senate of the United States which, on record, called the Protocols "a fabricated 'historic' document, a vicious hoax, that continues to be circulated by the unscrupulous and accepted by the unthinking." Nonetheless, these Protocols remain a legitimate academic source these states, some of which are members of this Council. The International Association of Jewish Lawyers and Jurists is repulsed by the ongoing use of this antisemitic propaganda, which has no other purpose but to promote hate. Endorsing these false Protocols, using them to educate young minds, undermines the well being of people in the Middle East and promotes conflict in the area. How can a dialogue exist if one party incites against and denies the very existence of the other party?

Sadly, the shameful use of these false Protocols is only one example of antisemitism; recently we witnessed Turkey's Prime Minister, Mr. Erdogan, expressing his view that "Zionism is a crime against humanity" and comparing Zionism to antisemitism, Fascism and Islamophobia. We ask Mr. Erdogan – does Zionism, which expresses the well-accepted and recognized right of the Jewish people to a home, a right recognized by the UN, incite to the murder of others? We abhor the cynical use of Zionism as justification for or validation of violations or racial and discriminatory behavior. Indeed, the UN Secretary General and other states have condemned Mr. Erdogan's statement. However, we believe that this statement should not be regarded in a void, but in its context: ongoing defamation of the Jewish people by state members of the UN and this Council. The Council should condemn unequivocally this hateful antisemitic statement.

Thus, we call upon the Council and its member states to ensure that these type of statements are not heard again within the UN. We call upon the *Special Rapportuer on Racism* to investigate and review this phenomenon, inter alia by conducting country visits, meetings with concerned parties and receiving submissions from NGO and civil societies.

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THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS (I.A.J.)

NGO: IAJLJ - The International Association of Jewish Lawyers and Jurists
Representative delivering the statement: Adv. Tom Gal

Human Rights Council 22nd Session, 11 March 2013 Item 4 – ID with Col on the Syrian Arab Republic

Thank you Mr. President,

The 2-years-long armed conflict buffeting Syria has cost thousands of lives and resulted in approximately 1 million refugees. Among these victims are children, women and elderly people who are not participants in the conflict. It is apparent from the report that the fighting has escalated dramatically in the last 6 months. The recent kidnapping of 21 UN personnel reflects this escalation and the lack of respect for international law. The International Association of Jewish Lawyers and Jurists abhors the illegal involvement of children in the hostilities, endangering their lives and violating Syria's obligations under the Convention of the Rights of the Child and its Protocols. Unfortunately, civilians and civilian objects are being abused routinely during the Syrian conflict, and both sides chose to shield and shelter military objects and operations in civilian areas, despite the consequent danger to the civilian population. The international community should also be concerned about the cultural and religious property being targeted and destroyed during the conflict. Recently, we witnessed the bombing and partial destruction of one of the oldest synagogues in the world, located in Damascus. Not only is such destruction a loss of Jewish and historical heritage but it is a violation of Syria's international obligations to protect cultural property.

As the report indicates, the list of international violations which have been committed during the Syrian conflict is both long and diverse; nonetheless, surprisingly, the Commission has refrained from recommending the adoption of a prominent accountability process, such as a referral to the International Criminal Court. On the contrary, the Commission still prefers to encourage a "political" resolution to the conflict. Syria's failure to protect its citizens has not been duly emphasized. Indeed, despite being aware of the reprehensible acts committed in Syria, some states have chosen to encourage the Syrian government. Recently, President Al-Assad visited Iran and was received with great hospitality and support, ignoring his responsibility for the Syrian people's suffering. Therefore, we urge the Council, its member states and the international community to act swiftly and immediately to bring an end to the international crimes committed in Syria, ensure that the perpetrators of such crimes do not go unpunished and condemn those states that support the Syrian government.

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THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS (R.A.)

Human Rights Council 2nd Session, 12 March 2013 Item 5 - General Debate

Thank you Mr. President,

The Human Rights Council Advisory Committee has recently published a report under Item 5 regarding the promotion of human rights and fundamental freedoms through a better understanding of traditional values. The report deals with a delicate and sensitive subject - the relationship between tradition and universal human rights. The International Association of Jewish Lawyers and Jurists supports the Advisory Committee in its aspiration to promote human rights when dealing with traditional societies. Yet, and as emphasized by the Advisory Committee itself, fundamental human rights cannot be overlooked and ignored in the name of tradition.

We are deeply concerned by the use of "traditional values" as a term justifying the marginalization of minorities and in particular gender-based groups. The term "tradition" is frequently used to justify the deprivation of the fundamental freedoms and human rights of these groups, and especially women. The International Association of Jewish Lawyers and Jurists is appalled by recent incidents of mistreatment of women in different parts of the world. In India statistics show that a woman is raped every 20 minutes. Recently, we heard the horrific story of 3 sisters, young girls who were raped, murdered and thrown into a well. In Pakistan, young women are being "sentenced" by tribal courts to be "gang-raped" as a punishment for offences committed by their family members. Education is being denied to girls in large areas of Pakistan. As several human rights organizations have shown, young girls under the age of 18 are being forcibly married to older men for money. Usually these young girls are abused and neglected by their husbands, they have no opportunity to obtain an education and approximately 30% die during childbirth.

The current statement is too short to cover all the incidents in which women and girls have been deprived of their fundamental freedoms or not been protected against serious violations of their human rights. We urge the relevant states to engage in legislation that will ensure this protection, and call upon them to enforce these protective laws fiercely and educate their government officials, including law enforcement personnel, to better respect, support and protect the dignity of women and girls. Finally, we urge the Special Rapporteur on violence against women its causes and consequences to address the matter, and specifically to conduct country visits to the relevant states.

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צֶדֶק

ENGLISH: 1. justness, correctness. 2. righteousness, justice. 3. salvation. 4. deliverance, victory. [ARAMAIC: צדק (he was righteous), SYRIAC: זדק (it is right), UGARITIC: *šdq* (= reliability, virtue), ARABIC: *šadaqa* (= he spoke the truth), ETHIOPIC: *šadaqa* (= he was just, righteous)] Derivatives: צדקה **POST-BIBLICAL HEBREW:** alms, charity. Cp. ARAMAIC צדקתה (= justice). PALMYRENE צדקתה (= it is right). צדק 1. just, righteous. 2. pious.

After Ernest Klein, A Comprehensive Etymological Dictionary of the Hebrew Language for Readers of English. 1987: Carta/University of Haifa

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