Should New Bills of Rights Address Emerging International Human Rights Norms? The Challenge of "Defamation of Religion"

Robert C. Blitt

DRAFT

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I. Introduction: Drafting a Bill of Rights in the 21st Century

The decision to draft a bill of rights heralds a momentous event in any country's history. In the latter half of the 20th century, fabricating a penultimate statement addressing the fundamental rights of individuals and groups and their relationship to the state has typically involved a flurry of public consultations, negotiations, drafting, and rewrites. Increasingly, however, such drafting efforts remain incomplete without some effort to observe, understand, and account for comparative trends related to human rights on the international level as well as in other states. As A.E. Dick Howard has observed:

> The international human rights revolution has had undeniable impact upon comparative constitutionalism. It is hard to imagine drafters of a new constitution going about their task unconcerned about human rights standards…For half a century, the Universal Declaration of Human Rights has served as a model for constitution makers. Countless constitutions written since 1948 contain guarantees that either mirror or draw upon the Declaration.[1]

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[1] A.E. Dick Howard, *A Traveler From An Antique Land: The Modern Renaissance of Comparative Constitutionalism*, 50 VA. J. INT'L L. 3-41, 18. Although this quote addresses constitutions, it applies equally to standalone bills of rights.

There are numerous examples across a wide range of states confirming this practice.[2] Recent drafting efforts in Iraq,[3] Afghanistan,[4] New Zealand,[5] South Africa,[6] and all the states of the former Soviet Union and Warsaw Pact[7] leap to mind, to name but a few. In each of these cases—and with varying degrees of success—national drafters held their country's unique cultural, historical, and political experiences up against the collective database of international experiences to divine commonalities, mutual priorities, shared aspirations, and points of divergence. Although no bright line rule has emerged requiring states drafting new bills of rights to undertake such a comparative assessment or import wholesale the standards contained in the major international human rights instruments, the pattern of consultation and endorsement is undeniable and may even signal an emerging international customary norm.[8] Indeed, the European Union has in the past made diplomatic recognition of states conditional on their willingness to pledge respect for human rights and provide legal "guarantees for the rights of ethnic and national groups and minorities."[9]

This paper posits that beginning the arduous task of drafting a bill of rights from a standpoint of openness towards comparativism and engagement with international norms affords the process several advantages. First, it informs the public at large that the discussion over the nature and scope of rights does not occur in the vacuum of domestic politics alone, but rather implicates larger ideas relevant to humanity as a whole.[10] Second, it allows states the ability to consciously

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[2] The majority of these states integrated bills of rights into their new constitutional documents. New Zealand focused exclusively on drafting a standalone bill of rights, a process currently being contemplated by Australia.

[3] Though ultimately deleted from Iraq's 2005 constitution, a draft version contained a provision that would have explicitly provided individuals "the rights contained in international human rights agreements to which Iraq is a party as long as those rights did not contradict the provisions of the constitution." Ashley S. Deeks, Matthew D. Burton, *Iraq's Constitution: A Drafting History*, 40 CORNELL INT'L L.J. 1, 32. The final constitutional text specifies that Iraq "shall observe the principles of good neighborliness…and respect its international obligations." Art. 8, Constitution of Iraq, 2005.

[4] Afghanistan's constitution requires the state to "abide by the UN charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights." Art. 7, Constitution of the Islamic Republic of Afghanistan, 2003.

[5] New Zealand's 1990 Bill of Rights stipulates that one of its purposes is to "To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights." New Zealand Bill of Rights Act 1990, Public Act 1990 No 109 (Date of assent 28 August 1990).

[6] In central and eastern Europe generally, international law, including the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), was "universally perceived" as one of the most important sources of human rights used for modeling new constitutional regulations. Wiktor Osiatynski, *Rights In New Constitutions of East Central Europe*, 26 COLUM. HUM. RTS. L. REV. 111, 161.

[7] It is widely acknowledged that South Africa's constitution drafting process borrowed from international treaties, national constitutions and international and foreign jurisprudence. Jeremy Sarkin, *The Effect of Constitutional Borrowings On the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions*, 1 U. PA. J. CONST. L. 176, 177.

[8] This paper is limited to exploring the relevancy of one possible emerging international human rights norm on the bill of rights dialogue unfolding in Australia. The larger question of whether states may be obligated to incorporate international human rights standards under customary international law when drafting a bill of rights is set aside for another occasion.

[9] *Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*' adopted by the Council of the European Community on 17 December 1991, reprinted in *Europe* (No. 5632, n.s.), 18 December 1991.

[10] By this, I simply mean that the experience of one state's drafting process and final instrument may in the future help inform the drafting process of the next state contemplating a new or revised bill of rights.

check draft domestic standards against their pre-existing international obligations under treaty or customary law. This, in turn affords drafters an opportunity to answer clearly and from the outset basic questions such as whether international or regional human rights treaty obligations will be directly enforceable or justiciable on the municipal level. Even where existing treaty rights are determined to be non-justiciable, drafters can still test to what extent draft domestic standards measure up against international norms.[11] Finally, exploring comparative and international experiences situates the debate in a broader context that is necessarily richer, more diverse, more informative, and more comprehensive. By plugging into this fecund ideascape, drafters can build up a robust domestic understanding of the content of rights, their related limitations, the dynamics of public-private and individual-group relationships, and the existing mechanisms for balancing rights where the inevitable conflicts arise. Related to this, exploring comparative and international sources affords the benefit of alerting drafters to emerging rights or norms that might otherwise not figure in the domestic debate, thus providing an enhanced opportunity to further adjust the draft language. Ultimately, such efforts—although more time-consuming and complex—can challenge pre-existing ideas and limitations, and generally result in a more vibrant drafting process as well as a more thoroughly "beta-tested" final product.

Particularly in light of Australia's long history of international engagement[12] and ongoing commitment to international human rights,[13] incorporating an earnest assessment of comparative experiences and benchmarks into a bill of rights drafting process seems a natural and worthy step. This approach also respects the desire of many Australians today to see their government "protect and promote all the human rights reflected in its obligations under international human

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[11] This advantage resonates with the Australian Human Rights Commission's existing mandate, which includes "making human rights values part of everyday life and language" and "keeping government accountable to national and international human rights standards." Australian Human Rights Commission, "About the Commission," http://www.hreoc.gov.au/about/index.html. Australia's federal parliament established the Commission (formerly the Human Rights and Equal Opportunity Commission) in 1986 as an independent statutory body that reports to parliament through the Attorney-General.

[12] For example, H. V. Evatt, an Australian, served as President of the UN General Assembly during the adoption and proclamation of the Universal Declaration of Human Rights. Australia was an original signatory to that Declaration. The Evatt Foundation, "Doc Evatt: A brilliant & controversial character," http://evatt.labor.net.au/about_evatt/.

[13] In the words of the Australian government: "Australia's commitment to the aims and purposes of the Universal Declaration of Human Rights reflects our national values and is an underlying principle of Australia's engagement with the international community." Australian Government, Department of Foreign Affairs and Trade, "Australia: Seeking human rights for all," http://www.dfat.gov.au/hr/hr_for_all.html and "Human Rights," http://www.dfat.gov.au/hr/. Australia maintains a seat on the current UN Human Rights Council and is a state party to all but two of the nine main human rights treaties. It regularly reports to each of the bodies responsible for overseeing the implementation of these treaties. Office of the United Nations High Commissioner for Human Rights (OHCHR) - Regional Office for the Pacific, *Ratification of International Human Rights Treaties: Added Value for the Pacific Region*, July 2009, 15, http://pacific.ohchr.org/docs/RatificationBook.pdf. Australia has not signed or ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, which entered into force on July 1, 2003. At the end of 2009, this treaty had mustered only 42 state parties. With the exception of Bosnia and Herzegovina, no western or central European state has ratified the treaty; Serbia is the only other European signatory to the convention (status as at: January 1, 2010). http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en. Australia also has not signed the International Convention for the Protection of All Persons from Enforced Disappearance. This treaty has not yet entered into force because it lacks the minimum number of state parties; twenty ratifications are required, only 18 have been secured to date (status as at: January 1, 2010). http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&lang=en.

rights law."[14] Indeed, the view of the Australian government appears to go one step further, identifying the advancement of human rights as every nation's responsibility: "[T]he function of government is to safeguard the dignity and rights of individuals, whose lives should be free of violence, discrimination, vilification, and hatred…*we do not rest on our laurels*. *We continue to strive to protect and promote human rights and to address disadvantage*."[15]

The issue then arises: surely existing international standards represent the normative floor rather than the ceiling. And Australia, given its position, can and should aspire to adopt not only existing standards but also the emerging ones that embody the normative human rights clouds as well. As Jacek Kurczewski and Barry Sullivan point out, the notion of minimum standards in human rights law "dialectically entails as well the notion of something more demanding than the minimum—that is, the possible expansion of rights to which people are entitled."[16] From this perspective, many additional questions follow: How much further should Australia go? What is the state of play regarding cutting edge issues such as intersex and transsex rights, the right to an adequate standard of living,[17] and migrant rights? What, if anything, should a bill of rights say on these issues?

At least in part, these questions can be addressed procedurally within the discussion over whether the bill of rights will be a succinctly worded statement that takes a general approach, or a longer document that engages specificities. However, beyond this, substantively, drafters still have a duty to inform themselves—and Australians generally—of what, if any, emerging human rights issues are relevant and how they should be addressed. As the Law Council of Australia suggested during the National Human Rights Consultation process, "Australia should actively engage with the process of developing new human rights principles through its interaction with international human rights bodies."[18] Obviously, this responsibility doesn't begin and end with the international bodies; rather, it necessarily arises in the context of interactions on the home front as well.

Against this backdrop, the following article addresses the emerging norm of "defamation of religion", one recent flashpoint in the international human rights dialogue that merits the attention of all parties playing a role in any drafting process. In the next section, I offer a brief

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[14] National Human Rights Consultation, *National Human Rights Consultation Report*, 30 September 2009, 73, http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReportDownloads#pdf (hereinafter *National Human Rights Consultation Report*).

[15] Australian Government, Attorney-General's Department, "Human Rights," http://www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_Humanrights (emphasis added).

[16] Jacek Kurczewski and Barry Sullivan, *The Bill of Rights and the Emerging Democracies*, 65-SPG LAW & CONTEMP. PROBS. 251, 259.

[17] The National Human Rights Consultation Report has recommended that "if economic and social rights are listed in a federal Human Rights Act, those rights not be justiciable and that complaints be heard by the Australian Human Rights Commission." National Human Rights Consultation, *National Human Rights Consultation Report*, 30 September 2009, xxxv, http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReportDownloads#pdf (hereinafter *National Human Rights Consultation Report*).

[18] *National Human Rights Consultation Report*, 72.

comparative history of the offense of blasphemy to help contextualize the intended meaning of defamation of religion. The third part of this article discusses how defamation of religion became the focus of dozens of United Nations (UN) resolutions, assesses the challenges associated with grafting the legal concept of defamation onto the mercurial notion of religion and its potential implications for existing international law, and takes stock of the ongoing debate as it stands today. The fourth part of this article draws some preliminary conclusions concerning the possible impact of enforcing a norm against defamation of religion and lastly considers to what extent—if at all—Australia should incorporate a response to this emerging norm in any future bill of rights.

II. A Comparative Overview of the Offense of Blasphemy: A Foundation for Understanding Defamation of Religion

A. Blasphemy in the West

Plainly stated, in theological terms, blasphemy is "a direct criticism of God and sacred objects."[19] In many states today, the offenses of blasphemy and heresy represent antiquated efforts to protect a worldview that comports with a given ruler's religious persuasion. The legal definition of blasphemy "developed historically to meet various, primarily political rather than religious, perceptions of a need for the law to protect institutions, originally the State itself."[20] In other words, the challenge posed by alleged heretics and blasphemers represented nothing less than an act of state treason threatening the very foundation of a society laid with the brick and mortar of an exclusive religious conviction.[21] The state could level blasphemy-related charges against an individual to protect the social or ideological underpinnings of society, or more specifically, use such charges "to suppress the expression of religious beliefs or opinions" perceived to be incorrect or unpopular with adherents of the dominant group.[22] With the offense of blasphemy enforced by the state, any nonconformist criticism of the dominant church—whether real or perceived—was not only dangerous, but "necessarily wrong when emanating from inferior subjects against their masters."[23] As U.S. Justice Felix Frankfurter famously observed: "Blasphemy was the chameleon phrase which meant the criticism of whatever the ruling authority of the moment established as orthodox religious doctrine."[24]

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[19] Reid Mortensen, *Blasphemy In A Secular State: A Pardonable Sin?*, [1994] 17(2) UNSW LAW JL 409, 409.
[20] Para. 7, Select Committee on Religious Offences in England and Wales, *Report-Appendix 3: Blasphemy* (2003), http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldrelof/95/9515.htm.
[21] For example, in recognizing blasphemy as a common law offense in 17th century England, the court held that "to say, religion is a cheat, is to dissolve all those obligations whereby the civil societies are preserved, and that Christianity is parcel of the laws of England; and therefore to reproach the Christian religion is to speak in subversion of the law." *R v. Taylor* (1676) 1 Vent. 293 (Taylor's case). In this brief quote, the court made plain the linkage between safeguarding the dominant faith and preserving the social and political order of the day.
[22] Tad Stahnke, *Proselytism and the Freedom to Change Religion in International Human Rights Law*, 1999 B.Y.U. L. REV. 251, 289 (1999).
[23] Leonard W. Levy, EMERGENCE OF A FREE PRESS, 5 (1985).
[24] *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952), 529.

As religion and state gradually decoupled in the west,[25] charges of blasphemy grew more infrequent. In the United States, prosecutions for blasphemy became "no more frequent than the sightings of snarks."[26] Still, in England, the common law offense persisted until its abolition in 2008.[27] Prior to this, UK courts concluded that blasphemy required little in the way of intent,[28] could result in a sentence of hard labor,[29] and only operated to protect the Church of England and its specific doctrines rather than all religious beliefs.[30] In other states where the offense was not abolished outright, the law generally fell into disuse by alleged violations being left unprosecuted or became unenforceable "either through stricter intent requirements or judicial attempts to strike a balance between conflicting rights."[31]

In Australia**,** the last successful prosecution for blasphemy occurred in 1871.[32] The 1990s ushered in an era of renewed interest related to the common law offense of blasphemy, in part

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[25] This trend may be linked to broader conditions of modernity leading to secularisation of society, wherein religion "becomes increasingly a private concern of the individual and thus loses much of its public relevance and influence." Riaz Hassan, *Expressions of religiosity and blasphemy in modern societies*, in Elizabeth Burns Coleman and Kevin White (eds.), NEGOTIATING THE SACRED: BLASPHEMY AND SACRILEGE IN A MULTICULTURAL SOCIETY, 119 (2006).

[26] Leonard W. Levy, TREASON AGAINST GOD, x (1981).

[27] s. 79, *UK Criminal Justice and Immigration Act 2008*, http://www.opsi.gov.uk/acts/acts2008/ukpga_20080004_en_1. The 2006 Racial and Religious Hatred Act arguably prohibits some acts that may have previously constituted blasphemy, however its provisions apply equally to all religions. Part 3A of the Act addresses "Hatred against persons on religious grounds." Under Section 29B(1), "A person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offense if he intends thereby to stir up religious hatred." The term "religious hatred" is defined as "hatred against a group of persons defined by reference to religious belief or lack of religious belief." In addition to the offense requiring the impugned communication to constitute a threat, Section 29J provides detailed protection for freedom of expression:

> Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.

Racial and Religious Hatred Act 2006, http://www.opsi.gov.uk/acts/acts2006/ukpga_20060001_en_1. The issue of incitement is discussed at greater length below.

[28] In 1979, the House of Lords affirmed a minimal threshold of intent for the offense of blasphemy, endorsing the trial judge's direction that "guilt of the offence of publishing a blasphemous libel did not depend on the accused having an intent to blaspheme, but that it was sufficient for the prosecution to prove that the publication had been intentional and that the matter published was blasphemous only the intent to publish blasphemous material as sufficient." *R. v Lemon (Denis)*, [1979] A.C. 617, 618 (also known as *Whitehouse v. Lemon*).

[29] William Gott, the last individual in the UK sentenced to a prison term for blasphemy, served nine months hard labor for distributing pamphlets describing Jesus Christ entering Jerusalem "like a circus clown on the back of two donkeys." (1922) 16 CR. APP. R. 87, 89.

[30] In *Choudhury v UK* (1991) HRLJ 172, members of Britain's Muslim community sought unsuccessfully to prosecute author Salman Rushdie for allegedly blaspheming against Islam in his novel, *The Satanic Verses*. See also *Q & A: Blasphemy law*, BBC News, Oct. 18, 2004, http://news.bbc.co.uk/2/hi/uk_news/3753408.stm.

[31] Osama Siddique and Zahra Hayat, *Unholy Speech and Holy Laws: Blasphemy Laws in Pakistan—Controversial Origins, Design Defects, and Free Speech Implications*, 17 MINN. J. INT'L L. 303, 354. For example, Germany's criminal code forbids insulting religion publicly or by dissemination of publications. However, successful prosecution requires "the manner and content" of the insult to rise to such a level that an objective onlooker could reasonably conclude it would disturb the peace of those targeted. Siddique and Hayat, 355.

[32] *R v Jones* (Unreported, New South Wales Supreme Court Quarter Sessions, Simpson J, 18 February 1871) in Butterworths, Halsbury's Laws of Australia, vol 23 (at 16 June 1996) 365 Religion, 'Status' [365-695].

triggered by the Salman Rushdie affair.[33] In 1991, the New South Whales (NSW) parliament requested its Law Reform Commission to explore "whether the present law relating to the offence of blasphemy is adequate and appropriate to current conditions."[34] In undertaking its mandate, the Commission acknowledged two key questions: first, "whether the offence [of blasphemy] is anachronistic in a modern society…which is multicultural, pluralistic and secular, and maintains a strict separation between Church and State"; and second, "whether the offence of blasphemy improperly impinges upon the fundamental right of freedom of speech."[35] Because the offense of blasphemy had not been successfully prosecuted in over a century, the Commission also observed that there was "a real question whether blasphemy still exists in the criminal law of New South Wales, even if it was 'received' as law in colonial times."[36]

As part of its findings, the Commission identified "several pieces of legislation in New South Wales…[that] assume[d] the existence of the crime" despite uncertainties regarding its reception from England.[37] Surveying the status of blasphemy in Australia's other states and territories, the Commission also found that apart from s. 574 of the Crimes Act 1900 (NSW), only the Tasmanian Criminal Code contained another express statutory reference to blasphemy,[38] while other jurisdictions had either abolished the offense altogether or maintained it as a common law crime.

After weighing various options, including retaining the common law offense of blasphemy, progressive codification, selective replacement, and outright abolition, the Commission endorsed abolition of blasphemy without a substitute or replacement offense as representing the best option for NSW.[39] This recommendation was based on the status of the offense in NSW, on findings that there been "no prosecutions for blasphemy in other Australian states, Scotland, Ireland, New Zealand or other comparable jurisdictions for over 50 years, and on the fact that every law reform commission which [had] considered blasphemy law reform has recommended abolition of the offence."[40] Notably, the Commission also found that anti-discrimination statutes were:

> better designed to preserve public order and social cohesion in a modern democratic society, given several important considerations: the emphasis on education and conciliation in the first instance; the clarity of the elements of the offences, and the protection of debate or discussion carried out in good faith; the

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[33] See *supra* note 30.
[34] Terms of Reference, New South Wales Law Reform Commission, *Blasphemy*, Report 74, 1994, http://www.austlii.edu.au/au/other/nswlrc/reports/74/R74TOR.html, and http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R74TOC (hereinafter *NSW Blasphemy Report*).
[35] Paras. 1.2-1.3, *NSW Blasphemy Report*, http://www.austlii.edu.au/au/other/nswlrc/reports/74/R74CHP1.html.
[36] Para. 1.4, *Id.*
[37] Para. 2.14 *NSW Blasphemy Report*, http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/nswlrc/reports/74/R74CHP2.html,
[38] Para. 3.2, *NSW Blasphemy Report*, http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R74CHP3.
[39] Paras. 4.3 and 4.81, *NSW Blasphemy Report*, http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/nswlrc/reports/74/R74CHP4.html.
[40] Para. 4.80, *Id.*

more realistic penalties; and the requirement of the consent of the Attorney General before criminal proceedings may be instituted.[41]

Within Australia's Federal law, early legislation revealed several efforts to enforce anti-blasphemy measures, particularly as related to books, television and film.[42] However, in the early 1990s a broader law reform initiative launched by the federal government addressing *Multiculturalism and the Law* (ALRC 57), recommended that: "All references to blasphemy in federal legislation should be removed. Offences that protect personal and religious sensibilities should be recast in terms of 'offensive material'."[43] This recommendation stemmed from the Commission's opposition to extending the law of blasphemy for the purpose of covering religions other than Christianity. In the Commission's view it "would be very difficult to devise a satisfactory definition of religion [to encompass faiths other than Christianity] and would be an unreasonable interference with freedom of expression" to perpetuate the offense of blasphemy.[44] Ultimately, in the wake of these findings, Australia's federal government acted to repeal much of the legislation containing blasphemy-related offenses.[45]

More recently, in the "Piss Christ" case,[46] the Catholic Archdiocese of Melbourne sought an injunction against the display of an allegedly blasphemous photograph by artist Andres Serrano on the grounds it constituted blasphemous libel. The photo, to be exhibited at the National Gallery of Victoria, depicted a crucified Jesus Christ that had been, according to the artist, immersed in urine when the photograph was taken. The Supreme Court of Victoria found against the plaintiff, based in part on its finding that there was "no evidence…of any unrest of any kind following or likely to follow the showing of the photograph in question", and because of the need for the court to contextualize the dispute with "regard to contemporary standards in a multicultural, partly secular and largely tolerant, if not permissive, society."[47] The Court concluded that if it were to "grant the relief sought by the plaintiff, [it] might thereby use the force of the law to prevent that which, by the same law, is lawful"[48]

B. Blasphemy in Muslim States

As noted above, blasphemy at its origin represented an ecclesiastical offense. In the west, implementation and enforcement of the offense through the common law provided protection

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[41] Para. 4.31, *Id*.
[42] Para. 3.12, *NSW Blasphemy Report*, http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R74CHP3.
[43] Para. 7.59, Australian Law Reform Commission, *Multiculturalism and the Law*, ALRC Report 57, 1992.
[44] Para. 7.59, *Id.*
[45] The Classification (Publications, Films and Computer Games) Act 1995 repealed the previous Customs (Cinematograph Films) Regulations of the Commonwealth. The prohibition against blasphemous works or articles contained in the 1956 Customs (Prohibited Imports) Regulations was discarded by amendment. Likewise, section 118 of the Broadcasting Act 1942 prohibiting the broadcast of blasphemous material was similarly excised by virtue of being replaced with the Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992.
[46] *Pell v Council of Trustees of the National Gallery of Victoria*, 1998 2 V.R. 391. For a discussion of this case, see Bede Harris, *Pell v Council of Trustees of the National Gallery of Victoria: Should Blasphemy Be A Crime? The 'Piss Christ' Case and Freedom of Expression*, 22 MELB. U. L. REV. 217.
[47] *Pell v Council of Trustees*.
[48] *Id*.

only for Christianity—and even then, often only for specific iterations of that faith. All other comers—including Muslims, Jews, and Hindus alike—were thus effectively barred from bringing the wrath of the law to bear against the perceived disparagement of their respective religions.

Similar to the Christian west, governments in the Muslim world likewise sought to outlaw offenses equivalent to blasphemous conduct. Under the systems that emerged, authorities invoked religious or statutory law to impose a variety of penalties against blasphemy, apostasy and other related acts.[49] Like their western counterparts, these parallel offenses[50] also shared a clearly identifiable connection with notions of treason or sedition against the state. This resulted in part due to the absence of any bright line separation between religion and state under the banner of Islam.[51] As Cherif Bassiouni has remarked, Islam provides a "holistic conception of life, government, law and hereafter. There is no division of church and state; there is no division between matters temporal and religious, and between different aspects of law."[52]

While the current trend in the west indicates a tendency to discard blasphemy offenses into the trash bin of history,[53] there appears to be no similar parallel movement within Muslim states. For example, in Pakistan, a declared Islamic state,[54] existing blasphemy laws have resulted in "several miscarriages of justice" and "exacerbate a growing environment of dogma and intolerance—spawning a culture of extremism and violence."[55] According to the 2009 U.S. Department of State International Religious Freedom Report, contravention of Pakistan's blasphemy laws may result in "death for defiling Islam or its prophets; life imprisonment for defiling, damaging, or desecrating the Qur'an; and 10 years' imprisonment for insulting another's religious feelings." The report also concludes that Pakistani authorities "routinely used

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[49] See for example Anthony Chase, *Legal Guardians: Islamic Law, International Law, Human Rights Law, and the Salman Rushdie Affair*, 11 AM. U. J. INT'L L. & POL'Y 375 and Perry S. Smith, *Speak No Evil: Apostasy, Blasphemy and Heresy in Malaysian Syariah Law*, 10 U.C. DAVIS J. INT'L L. & POL'Y 357.

[50] Although no exact offense parallel to the Judeo-Christian offense of blasphemy exists under Islam, insulting God, Mohammed or any other aspect of divine revelation amounts to an offense under Sharia. See Donna E. Arzt, *Heroes or Heretics: Religious Dissidents Under Islamic Law*, 14 WIILJ 349, 351-352. The article provides a long list of examples of blasphemy-type offenses prosecuted in the Muslim world. See also Hassan, *Expressions of Religiosity and Blasphemy in Modern Societies*, in Coleman and White, *supra* note 25.

[51] See for example Ann Elizabeth Mayer, ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS, 167-68 (4th ed. 2007) and Donna E. Arzt, *The Treatment of Religious Dissidents Under Classical and Contemporary Islamic Law* in Johan D. van der Vyver and John Witte, eds., RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: RELIGIOUS PERSPECTIVES (1996).

[52] M. Cherif Bassiouni, *Speech, Religious Discrimination, and Blasphemy*, American Society of International Law Proceedings, Apr. 5-8, 1989, 83 ASILPROC 427, 433.

[53] An exception to this trend is evident in Ireland's recently passed Defamation Act, which includes provisions covering the offense of blasphemy. The Defamation Act is discussed in Part IV below.

[54] For a closer examination of how the constitutional systems of Muslim states address religion-state relations, see Tad Stahnke and Robert C. Blitt, *The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries*, 36 GEO. J. INT'L L. 947 (2005).

[55] Siddique and Hayat, *supra* note 31, 384.

the blasphemy laws to harass religious minorities and vulnerable Muslims and to settle personal scores or business rivalries."[56]

In Malaysia, where Islam is the official state religion, the *Syariah Criminal Offences Act* enumerates "Offences Relating to the Sanctity of the Religion of Islam and its Institution," including:

> 7. Any person who orally or in writing or by visible representation or in any other manner—
> (a) insults or brings into contempt the religion of Islam;
> (b) derides, apes or ridicules the practices or ceremonies relating to the religion of Islam; or
> (c) degrades or brings into contempt any law relating to the religion of Islam for the time being in force in the Federal Territories.[57]

Punishment for these offenses may result in a prison sentence of up to two years in addition to any fine.

Also in Malaysia, the country's influential National Fatwa Council issued a ban (ultimately overturned) prohibiting Muslims from practicing yoga because it risked "destroy[ing] a Muslim's faith";[58] the regional Fatwa Council in the central state of Selangor threatened to sue the Malaysian Bar Association for using the word "Allah" on its website;[59] and the federal government imposed a blanket ban on circulating or publishing cartoons of the Prophet Mohammad after shuttering the Borneo-based *Sarawak Tribune* (and at least two other newspapers) for reprinting the now notorious *Jyllands-Posten* caricatures.[60]

In Indonesia, where the constitution is silent with regard to favoring secularism or Islam, the government actively invokes the criminal code to prosecute alleged blasphemy-related offenses. Under the Criminal Code, publicly "giving expression to feelings of hostility, hatred or contempt against one or more groups of the population of Indonesia," is punishable by a maximum

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[56] U.S. Dep't of State, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2009, Oct. 26, 2009, http://www.state.gov/g/drl/rls/irf/2009/127370.htm. During the previous reporting period, Pakistani "authorities arrested at least 25 Ahmadis, 11 Christians, and 17 Muslims on blasphemy charges." U.S. Dep't of State, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2008, http://www.state.gov/g/drl/rls/irf/2008/108505.htm.

[57] §7, SYARIAH CRIMINAL OFFENCES (FEDERAL TERRITORIES) ACT 1997 (Malaysia), http://www.agc.gov.my/agc/Akta/Vol.%2012/Act%20559.pdf. For an overview of the situation related to blasphemy in Malaysia, see Smith, *supra* note 49

[58] *Muslims Warned to Avoid Blasphemous Yoga*, WELT ONLINE, Nov. 22, 2008, http://www.welt.de/english-news/article2766685/Muslims-warned-to-avoid-blasphemous-yoga.html, and Robin Brant, *Malaysia Clerics Issue Yoga Fatwa*, BBC NEWS, Nov. 22, 2008, http://news.bbc.co.uk/2/hi/asia-pacific/7743312.stm.

[59] The Becket Fund, *Malaysia: Legal Body Faces Lawsuit for Using Word 'Allah'*, Mar. 23, 2009, http://becketinternational.wordpress.com/2009/03/23/malaysia-legal-body-faces-lawsuit-for-using-word-%E2%80%98allah%E2%80%99/.

[60] Mark Bendeich, *Malaysia Bans Prophet Cartoons as Protests Flare*, REUTERS, Feb. 10, 2006, http://www.wwrn.org/sparse.php?idd=20391. See also *Government Measures Limit Spread of Anger in Malaysia*, ASIA MEDIA, May 18, 2006, http://www.asiamedia.ucla.edu/religion/article.asp?parentid=45889.

imprisonment of four years or a fine.[61] While the Indonesian law as written is admirable for its attempt to move away from protecting only the majority faith from expressions of "hostility, hatred or contempt," in practice, the U.S. Department of State has concluded that instances where the law has "been enforced have almost always involved blasphemy and heresy against Islam."[62] Human Rights Watch has likewise concluded, "Indonesian laws prohibiting blasphemy are primarily applied to practices perceived to deviate from mainstream Islam."[63]

In practice, blasphemy charges have been invoked in a variety of situations, including an art exhibit containing photographic representations of fig leaf-covered Adam and Eve,[64] and against various individuals claiming to be reincarnations of the Prophet Muhammad (sentenced to three years),[65] and the archangel Gabriel (sentenced to two and a half years),[66] among others. Related to these efforts, but on a much broader scale, the government has severely restricted and even banned certain activities of the Ahmadi community, including public religious worship, as part of a clampdown pattern targeting groups deemed "heretical", "deviant" or heterodox.[67] Following Malaysia's lead, Indonesia's Ulema Council issued a similar fatwa prohibiting Muslims from practicing Yoga for fear it might corrupt their faith.[68]

Simply stated, unlike the present situation in most Western countries, snark sightings remain quite a common occurrence in the Muslim world. Many Muslim states continue to shield Islam from perceived criticism, however minor, and in certain instances use anti-blasphemy measures as an offensive tool to stifle the free exercise of religious belief for minority faiths and Muslim dissidents alike. Significantly, as illustrated in the above examples, such practices are not exclusive to religious regimes but rather may be observed across the spectrum of Muslim constitutional models—declared Islamic states, states with Islam declared the official religion,

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[61] Art. 156, PENAL CODE OF INDONESIA, Feb. 1952 (last amended 1999), http://www.unhcr.org/refworld/docid/3ffbcee24.html. For the purpose of these provisions, the term "group" is defined as being distinguished by "race, country of origin, religion, origin, descent, nationality or constitutional condition."
[62] U.S. Dep't of State, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2008, http://www.state.gov/g/drl/rls/irf/2008/108407.htm/. The State Department report notes dozens of individuals charged and convicted under Indonesia's criminal code.
[63] Human Rights Watch, 2009 WORLD REPORT, http://www.hrw.org/sites/default/files/reports/wr2009_web.pdf.
[64] *Indonesia: Blasphemy Case Against Adam and Eve Photo Exhibit*, INDO-ASIAN NEWS SERVICE, Feb. 3, 2006, http://religion.info/english/articles/article_227.shtml.
[65] Peter Gelling, *Indonesia Bans Sects It Deems Blasphemous*, N.Y. TIMES, Nov. 16, 2007, http://www.nytimes.com/2007/11/16/world/asia/16indo.html.
[66] Andra Wisnu, *Lia Eden Sentenced to Prison, Again*, THE JAKARTA POST, Jun. 3, 2009, http://www.thejakartapost.com/news/2009/06/03/lia-eden-sentenced-prison-again.html.
[67] U.S. Commission on International Religious Freedom, 2009 ANNUAL REPORT, 171, http://www.uscirf.gov/images/AR2009/final%20ar2009%20with%20cover.pdf.
[68] Niniek Karmini, *Indonesian Muslims Banned from Practicing Yoga*, ASSOCIATED PRESS, Jan. 26, 2009, http://www.wwrn.org/sparse.php?idd=30085.

states without an official religion, and secular states alike.[69] It is from within this milieu that the movement to prohibit "defamation of religion"—originally expressed in the more specific and decidedly less ecumenical slogan "defamation of Islam"—emerged a decade ago to begin its journey in search of international legitimacy.

III. Defamation of Religion: Blasphemy Goes International

A. Origins of Defamation of Religion at the United Nations

The 57-member state Organization of the Islamic Conference (OIC), which represents "the collective voice of the Muslim world,"[70] is responsible for spearheading the effort to secure international condemnation of acts deemed defamatory of religion—and more specifically, defamatory of Islam. In addition to its own ongoing internal reporting and resolutions on the issue,[71] the OIC—working through its individual member states—has focused on adding defamation of religion to the agendas of various UN bodies. The OIC submitted its first resolution addressing defamation of religion, originally entitled "Defamation of Islam" to the now defunct Commission on Human Rights (UNCHR) in 1999.[72] This proposed resolution sought to combat perceived negative international media coverage of "Islam as a religion hostile to human rights." In the view of Pakistan's UN ambassador, this negative media coverage amounted to a "defamation compaign" [sic] against the religion and its adherents to which the UNCHR had to react.[73] The draft expressed alarm at negative stereotyping of Islam and concern at the spread of intolerance against Islam specifically. Further, it called upon the "Special Rapporteur on religious intolerance to continue to devote attention to attacks against Islam and attempts to defame it."[74]

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[69] Because of space constraints, examples on anti-blasphemy measures in Turkey, a declared secular Muslim state, have been omitted. See Robert C. Blitt, *Bottom-up Migration of Anti-Constitutional Norms: The Case of Defamation of Religion*. (draft article on file with the author). Despite the apparent unity in governmental approach across all four Muslim constitutional systems, recent sociological data on blasphemy hints at the possibility that differentiation may exist among the citizenry of these states, with public opinion more closely mirroring the expectation that declared secular states would demonstrate little interest in upholding blasphemy-related offenses while their more religious counterparts would tend towards favoring such laws. See Hassan, *Expressions of Religiosity and Blasphemy in Modern Societies*, in Coleman and White.

[70] Organization of the Islamic Conference, *About OIC*, http://www.oic-oci.org/page_detail.asp?p_id=52.

[71] For a more detailed account of these activities, see Blitt, *Migration*, *supra* note 69.

[72] The first reference to defamation of Islam at the UN may be traced back to 1997. In reaction to a report addressing "Islamist and Arab Anti-Semitism" prepared by the UN special rapporteur on racism, Indonesia's ambassador alleged "defamation of our religion Islam and blasphemy against its Holy Book Qur'an." Rene Wadlow and David Littman, *Blasphemy at the United Nations?*, IV MIDDLE EAST QUARTERLY 4, Dec. 1997, http://www.meforum.org/379/blasphemy-at-the-united-nations. The UNCHR responded by adopting a consensus decision—supported by the United States and several other Western countries, which expressed "indignation and protest at the content of such an offensive reference to Islam and the Holy Qur'an," "Affirmed that that offensive reference should have been excluded from the report;" and "Requested…Special Rapporteur to take corrective action in response." UN Commission on Human Rights, *Racism, racial discrimination, xenophobia and related intolerance*, Resolution 1997/125, Apr. 18, 1997, http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/b195aa6921759f1a8025666c004a94d8?Opendocument.

[73] Para. 1-2, UN Commission on Human Rights, "Summary Record of the 61st Meeting," E/CN.4/1999/SR.61, Oct. 19, 1999.

[74] Para. 5, UN Commission on Human Rights, "Defamation of Islam", UN Doc. E/CN.4/1999/L.40, Apr. 20, 1999 (draft resolution submitted by Pakistan on behalf of members of the OIC).

In response to Pakistan's draft, Western governments proposed amendments to de-specify Islam and approach the challenge of discrimination from a more general perspective inclusive of all religions, including minority faiths.[75] Subsequent Pakistani sub-amendments sought to preserve specificity relating to "defamatory attacks against [Islam]"[76] and stressed that removing the resolution's focus on Islam "would defeat the purpose of the text, which was to bring a problem relating specifically to that religion to the attention of the international community."[77] Final negotiations resulted in a compromise that expressed concern over stereotyping of all religions rather than only Islam and retained the term "defamation" only in the resolution title.[78] The representative from Pakistan hailed the OIC member states' "considerable flexibility" in agreeing to a compromise resolution.[79] At the same time, Germany's representative, speaking on behalf of the European Union (EU), stressed the EU's collective "wish to make it clear that they did not attach any legal meaning to the term 'defamation' as used in the title."[80]

This seemingly inconsequential non-event served as defamation's proverbial foot in the door for two reasons: first, it tasked two UN Special Rapporteurs with taking into account provisions of the resolution in future reports to the UNCHR; and second, it expressed the Commission's intent "to remain seized of the matter."[81] In short, from this point forward, the concept of defamation of religion became systematized and integrated not only into the UNCHR agenda, but also into the mandates of the Special Rapporteur on Religious Intolerance and the Special Rapporteur on Racism, Racial Discrimination, Xenophobia and Related Intolerance.

Over the relatively short time span of 10 years, the Commission, its successor the Human Rights Council (HRC), and even the UN General Assembly (UNGA) proceeded to pass regular resolutions dedicated to combating "Defamation of Religion." A review of these resolutions demonstrates that invocation of the term "defamation" skyrocketed, from a solitary reference in 1999, to 23 references in 2009. Furthermore, placement of the term defamation within the resolution also shifted dramatically, from no references whatsoever in the body of the resolution, up to seven references in preambular passages in 2005, and to eight preambular references coupled with eight additional operative references most recently in 2009.[82] By employing the term "defamation" repeatedly and in the operative parts of these resolutions, its legal meaning—however questioned initially—necessarily takes on a new significance. To understand this

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[75] Para. 8, UN Commission on Human Rights, "Amendment to draft resolution E/CN.4/1999/L.40," UN Doc. E/CN.4/1999/L.90, Apr. 22, 1999. The amendments were put forward by Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxemburg, Netherlands, Portugal, Spain, Sweden, United Kingdom of Great Britain and Northern Ireland (joined by the Czech Republic, Latvia, Norway and Poland).
[76] Para. 8, UN Commission on Human Rights, "Proposed sub-amendments to the amendments to draft resolution E/CN.4/1999/L.40 contained in document E/CN.4/1999/L.90," UN Doc. E/CN.4/1999/L.104, April 28, 1999.
[77] Para. 8, "Summary Record of the 61st Meeting."
[78] UN Commission on Human Rights, Resolution 1999/82: "Defamation of Religions," Apr. 30, 1999, UN Doc. E/CN.4/RES/1999/82, adopted without a vote.
[79] Para. 1, UN Commission on Human Rights, "Summary Record of the 62nd Meeting," Apr. 30, 1999, UN Doc. E/CN.4/1999/SR.62, Nov. 17, 1999.
[80] Para. 9, *Id*.
[81] Para. 6, UNCHR Resolution 1999/82, *supra* note 78.
[82] Data on file with the author. For a more detailed treatment of how defamation of religion evolved over time at the United Nations, see Blitt, *Migration*, *supra* note 69.

significance, it is helpful to start with the legal definition of "defamation" and explore the implications of efforts to graft this concept onto protection of religion within the framework of international law.

B. Defining Defamation of Religion: Challenges to Existing Principles of Defamation Law and International Human Rights Law

1. Understanding Defamation Law

Although specifics may vary state to state, defamation is classically defined as the "act of harming the reputation of another by making a false statement to a third person"[83] or as an intentional false communication that injures another person's reputation.[84] From this starting point, several important elements are obvious: First, the offense must be directed at individuals (or possibly in certain instances at groups[85]) rather than against an idea, concept, or set of beliefs. Second, if the statement is merely an opinion, rather than an assertion of fact, a claim for defamation typically cannot be supported. In addition to the existing common law defense of fair comment,[86] under Australia's unified defamation law, a statutory defense to alleged defamation arises, *inter alia*, where the defendant proves that:

> (a) the matter was an expression of opinion of the defendant rather than a statement of fact, and
> (b) the opinion related to a matter of public interest, and
> (c) the opinion is based on proper material.[87]

In the United States, the Supreme Court has ruled that the distinction between fact and opinion, though less bright than previously held, is still relevant in establishing whether a defamation claim will be actionable. Following the decision in *Milkovich v. Lorain Journal Co.*,[88] communication in the form of an opinion may nevertheless be considered defamatory, but only if the statement of the opinion implies that the speaker has knowledge of provably false (i.e. defamatory) but undisclosed facts.[89] In other words, the opinion may be defamatory only if it is premised on some precursor provably false statement of fact. However, here the plaintiff must show that the false implications of the communication were made with some level of fault to

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[83] Black's Law Dictionary (8th ed. 2004).
[84] The right to freedom of opinion and expression, Report of the Special Rapporteur, Ambeyi Ligabo, E/CN. 4/2006/55, Dec. 30, 2005. This applies to individuals and corporations alike.
[85] In *Beauharnais v. Illinois*, a majority of the U.S. Supreme Court seemed to endorse the notion of group libel claims (343 U.S. 250, (1952)). However, the Ninth Circuit U.S. Court of Appeals has observed that "cases decided since *Beauharnais*…have substantially undercut this support. To the extent that *Beauharnais* can be read as endorsing group libel claims, it has been so weakened by subsequent cases such as *New York Times* that the Seventh Circuit has stated that these cases 'had so washed away the foundations of *Beauharnais* that it cannot be considered authoritative'…We agree with the Seventh Circuit that the permissibility of group libel claims is highly questionable at best." *Dworkin v. Hustler Magazine Inc*. 867 F.2d 1188, 1200.
[86] D. Rolph, *A Critique of the National, Uniform Defamation Laws* (2008) 16(3) TORTS LAW JOURNAL 207-248, 237. http://ssrn.com/abstract=1335071.
[87] Art. 31(1), Defamation Act 2005 (NSW), http://www.austlii.edu.au/au/legis/nsw/consol_act/da200599/.
[88] *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S.Ct. 2695.
[89] See Restatement (Second) of Torts, REST 2d TORTS § 566.

support recovery. As this practice indicates, a showing of intent may be required in certain instances.

Although the decision in *Milkovich* represented a more nuanced elaboration on the U.S. Supreme Court's decision in *Gertz v Robert Welch*, it preserved the principle rule that "there is no such thing as a false idea" under the First Amendment of the U.S. Constitution.[90] Moreover, *Milkovich* reaffirmed that statements which could not "reasonably [be] interpreted as stating actual facts" about an individual would fail to satisfy the test for defamation.[91] In the majority's view, this protection served as "assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation."[92]

2. Enforcing a Prohibition on Defamation of Religion: Definitional and Legal Impediments

With this very basic definition in hand, the problem of superimposing defamation as a legal framework for protecting religion becomes evident. In the first instance, enforcement of and limitations on defamation vary from jurisdiction to jurisdiction making it virtually impossible to extract any clear and consistent rules regarding its application to individuals. Beyond this, applying defamation to various systems of belief that come with their own set of unique but improvable truth claims further complicates the effort. These claims often may be directly at odds with the competing claims of another religious group. Indeed, the latter group may even consider such rival views "defamatory". However, defamation law can't effectively address these scenarios because they do not deal in provable statements of fact. The problem of providing a workable definition of "defamation of religion" is so apparent, that after 10 years of passing resolutions, neither the HRC nor the UNGA has ventured to undertake the task.[93]

The conceptual challenge of "defamation of religion" is exacerbated further when considering the nature and purpose of international human rights law. To begin, international human rights law, and specifically the right to freedom of religion or belief, "does not include the right to have a religion or belief that is free from criticism or ridicule."[94] This same body of law also recognizes the right of individuals to freedom of expression. And while the right to free expression may be limited in certain narrowly tailored contexts, hurt feelings alone do not rise to the level of a violation of rights that would justify such a limitation.[95] Recognizing such a limitation under international human rights law would entail nothing less than a reordering of

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[90] *Gertz v. Robert Welch, Inc*, 418 U.S. 323, 340.
[91] *Milkovich*, *supra* note 88, 2706.
[92] *Id.*
[93] Instead, there is much effort to blur the boundary between defamation and the concept of incitement. See Blitt, *Migration*, *supra* note 69.
[94] Para. 36, "Report of the Special Rapporteur on Freedom of Religion or Belief and the Special Rapporteur on Contemporary Forms of Racism on the incitement to racial and religious hatred and the promotion of tolerance," UN Doc. A/HRC/2/3, 20 Sept. 2006.
[95] Restrictions must be provided by law, and be necessary: (a) For respect of the rights or reputations of others; and (b) For the protection of national security or of public order (ordre public), or of public health or morals." Art. 19(3), International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966).

rights and result in the censoring of free expression by limiting, *inter alia*, "scholarship on religious issues and…asphyxiat[ing] honest debate or research."[96]

This reordering would also undermine freedom of religion, the very right ostensibly requiring greater protection by those advocating in favor of outlawing defamation. The history associated with protecting religious freedom is intimately tied to the protection of minority rights.[97] However, on the ground, it is clear that blasphemy charges have in the past been used to stifle freedom of religion, particularly for minority groups or those disfavored by the ruling party. By granting the charge of defamation an international imprimatur, it risks being used not as a shield, but rather as a sword to silence those deemed to have religious or political beliefs at odds with the majority faith. This risk explains why the UN Human Rights Committee, the body of independent experts tasked with interpreting the ICCPR's provisions and monitoring their implementation,[98] concluded almost 20 years ago that:

> If a set of beliefs is treated as official ideology in constitutions, statutes, proclamations of ruling parties, etc., or in actual practice, this shall not result in any impairment of the freedoms under article 18 [freedom of thought, conscience and religion] or any other rights recognized under the Covenant nor in any discrimination against persons who do not accept the official ideology or who oppose it.[99]

Further still, establishing defamation of religion as a legitimate basis for suppressing speech would essentially ascribe greater priority to the protection of a set of ideas than to individuals, the very group human rights law was envisioned to protect! Such an outcome would be antithetical to the very foundation of international human rights law.

Despite these red flags—and in contradiction to the recommendations of at least one UN Special Rapporteur—the UN General Assembly and the Human Rights Council in 2007 proceeded with efforts to modify longstanding consensus surrounding human rights norms. In similar resolutions, both UN bodies emphasized:

> …that everyone has the right to freedom of expression, which should be exercised with responsibility and may therefore be subject to limitations as provided by law and necessary for respect of the rights or reputations of others, protection of

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[96] Para. 42, UN Doc. A/HRC/2/3, *supra* note 94.
[97] See for example the 1919 treaty between Poland and the League of Nations (Little Treaty of Versailles) addressing minority rights in the newly created Polish state, 28 June, 1919.
[98] Office of the United Nations High Commissioner for Human Rights (OHCHR), "Human Rights Committee: Monitoring civil and political rights," http://www2.ohchr.org/english/bodies/hrc/index.htm.
[99] Para. 10, UN Human Rights Committee, General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18), July 30, 1993.

> national security or of public order, public health or morals and *respect for religions and beliefs*.[100]

The content of such resolutions signal nothing less than surreptitious efforts by the UNGA and the HRC—the body "responsible for strengthening the promotion and protection of human rights around the globe"[101]—to amend the longstanding legal consensus provided under the ICCPR. Using the limitations agreed upon in ICCPR article 19 as a jumping off point, both resolutions unilaterally *add* a limitation on the right of freedom of expression, namely "respect for religions and beliefs." In other words, in the minds of the majorities within the UNGA and HRC, speech labeled defamatory—or blasphemous—of religion is no longer worthy of protection, regardless of contrary views expressed by the Special Rapporteur on freedom of religion or belief or in the actual treaty text as provided under the ICCPR.

The steady effort on the part of OIC member states to entrench defamation of religion as a norm again bore fruit in 2008, when the UNGA passed a similar resolution, calling, *inter alia*, for increased restrictions on freedom of expression.[102] During voting in the Third Committee on the draft resolution submitted by Pakistan (on behalf of OIC member states),[103] the European Union maintained its position that:

> [It] did not see the concept of defamation of religions as valid in a human rights discourse; international human rights law protected primarily individuals, rather than religions as such, and religions or beliefs in most States did not enjoy legal personality.[104]

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[100] See para. 9, UN General Assembly, "Combating Defamation of Religions," UN Doc. A/RES/61/164, Feb. 21, 2007, and para. 10, Human Rights Council, "Combating defamation of religions," UN Doc. A/HRC/Res/4/9/, 30 March 2007. The vote in the General Assembly was 111 votes to 54, with 18 abstentions. In the Council, the recorded vote was 24 to 14 with nine abstentions.

[101] United Nations, "The Human Rights Council," http://www2.ohchr.org/english/bodies/hrcouncil/.

[102] Para. 10, General Assembly Resolution 62/154: Combating Defamation of Religions, UN Doc. A/RES/62/154, Mar. 6, 2008. The resolution passed with a recorded vote of 108 to 51, with 25 abstentions. See Annex X, Department of Public Information, *General Assembly Adopts Landmark Text Calling For Moratorium On Death Penalty: Adopts 54 Resolutions, 12 Decisions Recommended by Third Committee*, UN Doc. GA/10678, Dec. 18, 2007, http://www.un.org/News/Press/docs/2007/ga10678.doc.htm

[103] Pakistan, "Combating Defamation of Religions" (draft resolution), UN Doc. A/C.3/62/L.35, Nov. 2, 2007. Subsequently, Belarus and Venezuela joined in sponsoring the draft resolution. Report of the Third Committee, "Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms," UN Doc. A/62/439/Add.2. The Third Committee endorsed the draft by a vote of 95 in favor to 52 against, with 30 abstentions. For the voting record, see Annex III, UN Department of Public Information, *Third Committee Approves Three Country-Specific Texts On Human Rights: Despite Opposition Led By Developing Countries*, UN Doc. GA/SHC/3909, Nov. 20, 2007, http://www.un.org/News/Press/docs/2007/gashc3909.doc.htm.

[104] UN Doc. GA/SHC/3909, *supra* note 103.

3. Which Way Forward: Defamation of Religion as Customary International Law or As a Form of Incitement?

Although some states continue to make the case that "defamation of religion" represents an unworkable chimera, consistent majorities in the HRC and UNGA beg to differ. Despite this majority, General Assembly resolutions are arguably only a representation of that body's opinion and are therefore not legally binding. In accordance with the UN Charter, the UNGA is not intended to serve as a legislative body:

> The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and…*may make recommendations* to the Members of the United Nations or to the Security Council or to both on any such questions or matters.[105]

However, it is also generally recognized that over time, UNGA resolutions may come to reflect and have the binding force of customary international law. The classic example of such practice is embodied in UNGA Resolution 217A (1948), more commonly known as the Universal Declaration on Human Rights (UDHR).[106] Over time, this landmark Declaration has come to be acknowledged by a variety of authorities as reflective of customary international law norms,[107] despite the fact that its drafters plainly intended it to have no legally binding effect on states. In the words of Eleanor Roosevelt, chairperson of the UN Commission on Human Rights tasked with drafting the document, the UDHR "was not a treaty or international agreement and did not impose legal obligations; it was rather a statement of basic principles of inalienable human rights setting up a common standard of achievement for all peoples and all nations."[108]

Most recently at the end of 2009, the UNGA again endorsed a resolution on combating defamation of religion.[109] Notably, the resolution "received the most 'no' votes of any text

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[105] Art. 10, Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, entered into force Oct. 24, 1945 (emphasis added).
[106] G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).
[107] See for example, *Filartiga v. Pena-Irala*, 630 F.2d 876, where the U.S. Court of Appeals (2nd) held that the prohibition against torture "has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights…" (para. 24). According to Hurst Hannum, "Many of the Universal Declaration's provisions also have become incorporated into customary international law, which is binding on all states." Hurst Hannum, *The UDHR In National and International Law*, Vol. 3, No. 2, FIFTIETH ANNIVERSARY OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (1998), 145, 145.
[108] Part B(1)(a), Chapter V., Social, Humanitarian and Cultural Questions; Section A., Human Rights, UNITED NATIONS YEARBOOK SUMMARY, 1948, http://www.udhr.org/history/yearbook.htm.
[109] UN General Assembly Resolution A/RES/64/156 (not yet published). The "Combating defamation of religions" resolution as passed in the Third Committee is referenced as UN Doc. **A/64/439/Add.2** (Part II).

considered"[110] at the Assembly's 64th session[111] even though the endorsement of a limitation on freedom of expression based on "*respect for religions and beliefs*" was conspicuously missing from the text.[112] Still, the resolution continued to express "deep concern" over "the intensification of the overall campaign of the defamation of religions," despite offering nothing to substantiate the finding.[113]

At this point, a growing rift between the special rapporteurs on freedom of expression and religion or belief (and possibly the Office of the High Commissioner on Human Rights) on the one hand, and certain member states of the General Assembly on the other, has become

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[110] UN Department of Public Information, "General Assembly Adopts 56 Resolutions, 9 Decisions Recommended by Third Committee on Broad Range of Human Rights, Social, Cultural Issues," UN Doc. GA/10905, Dec. 18, 2009, http://www.un.org/News/Press/docs/2009/ga10905.doc.htm.

[111] The resolution (UN Doc. A/64/439/Add.2, part II) was adopted by a recorded vote of 80 in favor to 61 against, with 42 abstentions, as follows:
In favor: Afghanistan, Algeria, Angola, Azerbaijan, Bahrain, Bangladesh, Barbados, Belarus, Bhutan, Bolivia, Brunei Darussalam, Cambodia, Chad, China, Comoros, Congo, Côte d'Ivoire, Cuba, Democratic People's Republic of Korea, Democratic Republic of the Congo, Djibouti, Dominica, Dominican Republic, Egypt, El Salvador, Eritrea, Ethiopia, Gabon, Guinea, Guinea-Bissau, Guyana, Indonesia, Iran, Iraq, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Lebanon, Libya, Malaysia, Maldives, Mali, Mauritania, Morocco, Mozambique, Myanmar, Namibia, Nicaragua, Niger, Nigeria, Oman, Pakistan, Philippines, Qatar, Russian Federation, Saint Vincent and the Grenadines, Saudi Arabia, Senegal, Singapore, Somalia, South Africa, Sri Lanka, Sudan, Suriname, Swaziland, Syria, Tajikistan, Thailand, Togo, Tunisia, Turkey, Turkmenistan, Uganda, United Arab Emirates, Uzbekistan, Venezuela, Viet Nam, Yemen.
Against: Andorra, Australia, Austria, Belgium, Bulgaria, Canada, Chile, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Marshall Islands, Mexico, Micronesia (Federated States of), Monaco, Montenegro, Nauru, Netherlands, New Zealand, Norway, Palau, Panama, Papua New Guinea, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Saint Lucia, Samoa, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Timor-Leste, Tonga, Ukraine, United Kingdom, United States, Uruguay, Vanuatu.
Abstain: Albania, Antigua and Barbuda, Argentina, Armenia, Bahamas, Belize, Benin, Bosnia and Herzegovina, Botswana, Brazil, Burkina Faso, Burundi, Cameroon, Cape Verde, Colombia, Costa Rica, Ecuador, Equatorial Guinea, Fiji, Ghana, Grenada, Guatemala, Haiti, Honduras, India, Jamaica, Japan, Kenya, Lesotho, Liberia, Malawi, Mauritius, Mongolia, Nepal, Paraguay, Peru, Rwanda, Saint Kitts and Nevis, Trinidad and Tobago, Tuvalu, United Republic of Tanzania, Zambia.
Absent: Central African Republic, Gambia, Kiribati, Madagascar, Sao Tome and Principe, Seychelles, Sierra Leone, Solomon Islands, Zimbabwe.
See Annex VIII, UN Doc. GA/10905, *supra* note 110.

[112] The provision is stricken from the paragraph addressing freedom of expression. It was also absent in 2008. See Para. 10, UN Doc. A/64/439/Add.2 (Part II), *supra* note 109, and Para. 10, UN General Assembly Resolution, "Defamation of Religions," UN Doc. A/RES/63/171, 24 March 2009. In 2009 the Human Rights Council elected to forgo a resolution on combating defamation of religion. This may or may not be related to the High Commissioner on Human Rights' deferral of a report on the issue until the HRC's thirteenth session. "Note by the Secretariat, Report of the United Nations High Commissioner for Human Rights on the implementation of Human Rights Council resolution 10/22 ('Combating defamation of religions')," UN Doc. A/HRC/12/39, 8 July 2009, http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-39_E.pdf. See also Human Rights Council, "Promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind, " UN Doc. A/HRC/RES/12/21, 12 October 2009, http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G09/167/24/PDF/G0916724.pdf?OpenElement. In the meantime, in 2009 the HRC passed an equally ominous new resolution entitled "Promoting human rights and fundamental freedom through a better understanding of traditional values of humankind" for the first time. Though some of the problems raised by this resolution are related, they fall outside the immediate scope of this article.

[113] Para. 5, UN Doc. A/64/439/Add.2 (Part II), *supra* note 109,

evident.[114] The special rapporteurs have—only recently—attempted to steer the debate over defamation away from its sociological overtones and anchor protection efforts into the more palatable—and arguably legally definable—notion of incitement.[115] Ironically, perhaps the clearest indication of this desired shift in approach, a joint statement prepared by three Special Rapporteurs, occurred as one of 15 official OHCHR "side events" during the 2009 Durban Review Conference, lacks an official UN Document number, and is virtually buried on the UN's website.[116] This joint statement, *inter alia*, called vivid attention to some of the underlying problems with the concept of defamation of religion:

> the difficulties in providing an objective definition of the term "defamation of religions" at the international level make the whole concept open to abuse. At the national level, domestic blasphemy laws can prove counter-productive, since this could result in the de facto censure of all inter-religious and intra-religious criticism. Many of these laws afford different levels of protection to different

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[114] The U.S. described the voting over the most recent defamation resolution as evidencing an "increasingly splintered view" within the General Assembly. UN Department of Public Information, "Third Committee Approves Resolution Aimed at 'Combating Defamation of Religions', One of 16 Draft Texts Recommended to General Assembly," UN Doc. GA/SHC/3966, 12 Nov., 2009, http://www.un.org/News/Press/docs/2009/gashc3966.doc.htm.

[115] Strident support for prohibiting defamation of religion is evident across most of the reports prepared by Doudou Diène, the special rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance. For example, Diène "urges the Commission to invite the Special Rapporteur to submit a regular report on all manifestations of defamation of religion, stressing the strength and seriousness of Islamophobia at the present time." Para. 37, Report by Mr. Doudou Diène, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, UN Doc. E/CN.4/2006/17, Feb. 13, 2006. However, a survey of the reporting by the UN special rapporteurs and the OHCHR over 10 years indicates a sudden about-face away from the defamation concept in favor of incitement. Particularly in 2008, a sea change in attitude is evident, even in Diène's reporting. Although non-existent as a concern over nearly 10 years of reporting, Diène suddenly argues that "With a view to promoting this change of paradigm, translating religious defamation from a sociological notion into a legal human rights concept, namely incitement to racial and religious hatred," will show "that combating incitement to hatred is not a North-South ideological question but a reality present in a large majority of national legislations in all regions." Para. 45, Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, on the manifestations of defamation of religions and in particular on the serious implications of Islamophobia on the enjoyment of all rights, UN Doc. A/HRC/9/12, Sept. 2, 2008. In contrast to Diène, special rapporteur on freedom of religion Abdelfattah Amor early on stressed that "very frequently, prohibitions against acts of defamation or blasphemy are misused for the purposes of outright censorship of the right to criticism and discussion of religion and related questions," and that in "many cases, defamation becomes the tool of extremists in censoring and maintaining or propagating obscurantism." Para. 97, Interim report by the Special Rapporteur of the Commission on Human Rights on the elimination of all forms of intolerance and of discrimination based on religion or belief, UN Doc. A/55/280, Sept. 8, 2000. Still Amor also maintained that the issue of defamation reflected one of his "major concerns…because it is an intrinsic violation of the freedom of religion or belief." Para. 137, Report submitted by Mr. Abdelfattah Amor, Special Rapporteur on freedom of religion or belief, UN Doc. E/CN.4/2004/63, Jan. 16, 2004. These reports are addressed more fully in Blitt, *Migration*, *supra* note 69.

[116] Joint statement by Mr. Githu Muigai, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; Ms. Asma Jahangir, Special Rapporteur on freedom of religion or belief; and Mr. Frank La Rue, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Freedom of Expression and Incitement to Racial or Religious Hatred*, OHCHR side event during the Durban Review Conference, Geneva, 22 April 2009, 1, http://www2.ohchr.org/english/issues/racism/rapporteur/docs/Joint_Statement_SRs.pdf. Searching for "Joint statement of three Special Rapporteurs on incitement to racial or religious hatred" returns only two results from http://search.ohchr.org and http://www.google.com alike. Searching for "Freedom of Expression and Incitement to Racial or Religious Hatred" returns eight hits, four of which are UN-based websites. The document can also be accessed from http://www2.ohchr.org/english/issues/religion/index.htm.

> religions and have often proved to be applied in a discriminatory manner. There are numerous examples of persecution of religious minorities or dissenters, but also of atheists and non-theists, as a result of legislation on religious offences or overzealous application of laws that are fairly neutral.[117]

Even as certain individual and institutional voices begin endorsing this position, it remains likely that the debate will continue to spill over to the UNGA's forthcoming 65th session. Moreover, the reality remains that a majority of states at the UN continue to favor promulgating a new norm prohibiting defamation of religion, even if means fitting it in under a more consensual rubric of incitement. As Masood Khan, Pakistan's UN ambassador, reminded the Human Rights Council in 2008, the ultimate objective of OIC member states is a "new instrument or convention" addressing defamation.[118] As for the OIC, it already considers defamation a legitimate and existing norm: "The succession of UNGA and UNHRC [UN Human Rights Council] resolutions on the defamation of religions *makes it a stand alone concept with international legitimacy*."[119]

In light of these views, the paradigm shift advocated by the special rapporteurs remains uncertain at best, and possibly may amount to no more than putting lipstick on a pig. Even if the UNGA and HRC drop the effort to entrench a norm built around the specific language of defamation, there is little indication that a compromise "incitement to religious hatred" norm would function any differently. In other words, the incitement model may still be used by the OIC and others to establish a justification under international law for outlawing speech, religious practice and other actions deemed blasphemous (and *ergo*, an incitement) by the ruling government. It is worthwhile to stress here that support for a defamation of religion norm transcends OIC member states. Countries such as Russia and China continue to be strong proponents of defamation of religion. For example, former Russian Orthodox Church Patriarch Alexy II latched onto the concept of defamation of religion as a basis for building Christian-Muslim cooperation: "in the framework of international organizations, it seems useful to create mechanisms that make it possible to be more sensitive to the spiritual and cultural traditions of various peoples."[120]

IV. Defamation of Religion and Drafting Australia's Bill of Rights

In the immediate context of ongoing efforts to better protect and promote human rights in Australia,[121] the issue of defamation of religion merits consideration for a number of reasons. First, taking stock of current international human rights debates and accounting for them in any

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[117] Freedom of Expression and Incitement to Racial or Religious Hatred, *supra* note 116, 2.
[118] Steven Edwards, *UN anti-blasphemy measures have sinister goals, observers say*, CANWEST NEWS SERVICE, Nov. 24, 2008, http://www2.canada.com/theprovince/news/story.html?id=9b8e3a6d-795d-440f-a5de-6ff6e78c78d5.
[119] 2nd OIC Observatory Report on Islamophobia, June 2008 to April 2009, issued at the 36th council of foreign ministers, Damascus, Syrian Arab Republic, May 23-25, 2009, 4 (emphasis added).
[120] "Response from His Holiness Patriarchy Alexy II of Moscow and all Russia [to the open letter of 138 Muslim Theologians]," April 18, 2008, http://acommonword.com/en/a-common-word/6-christian-responses/202-response-from-his-holiness-patriarchy-alexy-ii-of-moscow-and-all-russia.html.
[121] This is in fact one of the objectives of Australia's National Human Rights Consultation. See http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Terms_of_Reference.

final instrument may better position that document to meet potential future challenges. For example, by exploring the issue of defamation, drafters can address the scope and priority to be assigned to freedom of expression and freedom of religion or belief, including what limitations may be applicable and when. Such a step can be a useful part of the process of determining where Australia wants to situate itself and its citizens vis a vis emerging human rights norms. This approach also syncs with the Australian Human Rights Consultation Committee's finding that "Newly emerging rights in international law—such as the right to a clean and sustainable environment—are constantly in the Australian public's gaze."[122] In other words, Australians favor an open-minded and exploratory attitude for approaching these fundamental questions. Such an approach should necessarily consider *lex lata,* but also *lex ferenda* and other sources of potentially expansionary human rights concepts.

Second, a robust upfront discussion on defamation of religion can help resolve potential inconsistencies between Australian foreign policy and national law. This is particularly important given the arguably ambivalent position espoused by Australia and some other states towards mixing religion into defamation-based offenses. Although Australia's voting record at the UN consistently has rejected defamation of religion resolutions, existing municipal legislative initiatives indicate the possibility of allowing prosecution of such offenses in the name of fostering tolerance. For example, Victoria's controversial Racial and Religious Tolerance Act specifically prohibits "conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule" of persons "on the ground of religious belief or activity."[123] The Act also provides various exceptions, including where conduct of the accused is deemed to have occurred reasonably and in good faith:

> (a) in the performance, exhibition or distribution of an artistic work; or
> (b) in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in, for—
> (i) any genuine academic, artistic, religious[124] or scientific purpose; or
> (ii) any purpose that is in the public interest; or
> (c) in making or publishing a fair and accurate report of any event or matter of public interest.[125]

While the exemptions seem broadly construed, the Act renders motive irrelevant in determining whether an offense has occurred[126] and boasts an extra-territorial effect covering conduct that may have transpired outside of Victoria proper.[127] Nevertheless, it would appear that the law does

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[122] National Human Rights Consultation Report, 346.
[123] Art. 8, Racial and Religious Tolerance Act 2001, No. 47 of 2001 (Version No. 006), incorporating amendments as at 1 October 2009.
[124] An amendment added in 2006 provides that "a religious purpose includes, but is not limited to, conveying or teaching a religion or proselytizing." Art. 11(2), *Id*.
[125] Art. 11(1), *Id*. Article 12 addresses exceptions for private conduct, "in circumstances that may reasonably be taken to indicate that the parties to the conduct desire it to be heard or seen only by themselves."
[126] Art. 9(1), *Id*.
[127] Art. 8(2)(b), *Id*.

not afford protection to religious beliefs *per se*, bur rather only to adherents as individuals and a group. In *Fletcher v Salvation Army Australia*, the administrative tribunal found that the act:

> is not concerned with the vilification of a religious belief or activity as such. Rather it is concerned with the vilification of a person, or a class of persons, on the ground of the religious belief or activity of the person or class…The law does not stop a person from engaging in conduct that involves contempt for, or severe ridicule of, a religious belief or activity, provided this does not incite hatred against, serious contempt for, or revulsion or severe ridicule of another person or a class of persons on the ground of such belief or activity. The law recognises that you can hate the idea without hating the person."[128]

Complicating this situation however, is the appearance of support for a norm of defamation of religion on the ground in Australia. During a government-sponsored inquiry into revising the existing law on blasphemy in NSW,[129] the New South Wales Council of Churches (NSWCC) offered detailed submissions in favor of a new codification of the offence of blasphemy. As part of this re-codification effort, the NSWCC expressed support for retaining the offense but replacing the term "blasphemy" with either "religious vilification" or "religious defamation", labels they argued would avoid any misunderstanding or misconstruing of the offense, but preserve its essence—i.e., prohibiting criticism of religious beliefs and symbols.[130] Drafters should be cognizant of such expressions of domestic support for retaining a blasphemy offense for two reasons: First, they mirror efforts on the international level to package an old offense in new, less "offensive" terms; and second, because such supporters are still deserving of acknowledgement and a thoughtful explanation as to why reviving blasphemy may be at odds with other rights values contemplated as worthy of protection under any future bill of rights.

The importance of having drafters clarify Australia's position therefore cannot be overstated. This becomes particularly evident when considering the emerging law in Ireland. Like Australia, Ireland has consistently voted against defamation of religion resolutions at the UN. Following the December 2008 vote on "Combating Defamation of Religion", Ireland's Minister for Foreign Affairs Micheál Martin explained: "We believe that the concept of defamation of religion is not consistent with the promotion and protection of human rights. It can be used to justify arbitrary limitations on, or the denial of, freedom of expression. Indeed, Ireland considers that freedom of expression is a key and inherent element in the manifestation of freedom of thought and conscience and as such is complementary to freedom of religion or belief."[131]

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[128] Para. 7, *Fletcher v Salvation Army Australia* (Anti Discrimination) [2005] VCAT 1523 (1 August 2005).
[129] For a discussion of the Commission's findings, see Part II(a) above.
[130] Para. 4.40, *NSW Blasphemy Report*, http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/nswlrc/reports/74/R74CHP4.html.
[131] *New blasphemy laws—Free speech is not up for discussion*, IRISH EXAMINER, May 1, 2009, http://www.examiner.ie/opinion/editorial/new-blasphemy-laws--free-speech-is-not-up-for-discussion-90664.html#ixzz0LGSB9SNr&C.

However, Ireland's constitution has long provided that the "publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law.[132] To this end, a 2009 law enacted by the Oireachtas[133] has made it an offense (carrying a fine of up to €25,000) for anyone to publish or utter "blasphemous matter."[134] Under the new law, in force since January 2010, a blasphemous communication "is grossly abusive or insulting in relation to matters held sacred by any religion, thereby causing outrage among a substantial number of the adherents of that religion."[135]

Unlike Victoria's Racial and Religious Tolerance Act, the Irish offense establishes a *mens rea* threshold, whereby it must be demonstrated the accused intended "by the publication or utterance of the matter concerned, to cause such outrage."[136] The law also affords a defense to the charges if the defendant can prove "that a reasonable person would find genuine literary, artistic, political, scientific, or academic value in the matter to which the offence relates."[137] However, these grounds are arguably narrower than Victoria's since no reference is made to the legitimacy of religious purposes or to the catch-all provision "any purpose that is in the public interest." More problematic still, Ireland's law explicitly protects "matters held sacred by any religion." It therefore appears to track more closely with the push to outlaw defamation of religion at the UN, giving rise to an apparent inconsistency—if not outright conflict—between the law itself and statements of Foreign Affairs Minister Martin. As it stands, Ireland's Defamation Act potentially may run afoul of that country's obligations under international law and the European Convention on Human Rights. Indeed, at least one group has already taken steps to challenge the legality of the Act's provisions on "blasphemous matter."[138]

By encouraging the drafters of Australia's bill of rights to confront questions related to religious defamation and vilification directly, potential inconsistencies in law and foreign policy similar to those arising in Ireland may be avoided. There is already some guidance on this issue emerging from the Australian judiciary, including an arguably narrow definition of incitement,[139] as well as a directive to avoid conflating for legal purposes hatred of a given belief and hatred of adherents

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[132] Art. 40, Constitution of Ireland, Adopted July 1, 1937.
[133] A strict time limit, known as a guillotine, was imposed on the debate in the Dáil. Following the lower house vote, Ireland's Seanad passed the bill in nail-biting 23-22 vote, with the Green Party voting in favor. *Libel law revisions pass the Dáil*, July 8, 2009, http://www.rte.ie/news/2009/0708/libel.html. Stephen Collins, *Defamation Bill stumbles through Seanad after lost vote*, IRISH TIMES, JUL. 10, 2009, http://www.irishtimes.com/newspaper/frontpage/2009/0710/1224250388598.html.
[134] Art. 36(1), Defamation Bill 2006. Prior drafts of the new law originally called for a maximum €100,000 fine for the offense.
[135] Art. 36(2)(a), *Id*.
[136] Art. 36(2)(b), *Id*.
[137] Art. 36(3), *Id*.
[138] For example, an Irish atheist group published a series of "blasphemous" quotations by personalities including Jesus Christ, Mohammed, Mark Twain, Salman Rushdie and Bjork in an effort to challenge the law in court. CNN, *Irish Atheists Use Bjork, Mark Twain to Challenge Blasphemy Law*, http://www.cnn.com/2010/WORLD/europe/01/02/ireland.blasphemy.law/index.html.
[139] For example, in *Fletcher v Salvation Army Australia*, the tribunal focused on the meaning of "incite" under the Racial and Religious Tolerance Act: "In its context, this does not mean 'causes'. Rather it carries the connotation of 'inflame' or 'set alight'. The section is not concerned with conduct that provokes thought." Para. 5, *Fletcher v. Salvation Army*, *supra* note 128.

of that belief. In *Catch the Fire*, the Victoria Court of Appeal held that the Racial and Religious Tolerance Act does not "purport to mandate religious tolerance."[140] Further, it found that the lower tribunal erred by failing to give due consideration to the distinction between hatred of religious beliefs and hatred of adherents of a given faith. According to the Court, the Act "goes no further in restricting freedom to criticise the religious beliefs of others than to prohibit criticism so extreme as to incite hatred or other relevant emotion of or towards those others. It is essential to keep the distinction between the hatred of beliefs and the hatred of their adherents steadily in view."[141]

Finally, even if the drafters elect to reject the defamation norm currently espoused by a majority of UN member states, the process of reaching this decision will help establish the legal justifications for such a position. Such a decision would occur within the context of a comprehensive evaluation of the proposed norm, and would in turn position the bill of rights to address, either head on or implicitly, any possible future gaps or inconsistencies between international human rights law and Australia's domestic implementation of rights. In short, drafters can enshrine a more long-term vision of what rights are germane to Australia and how these rights will operate by evaluating not only norms expressed in the relevant treaty law, but also the emerging and potential norms that are on or just beyond the horizon. This process would also have the benefit of strengthening Australia's prestige on the international level by "limit[ing] future criticism for non-compliance [and] bolster[ing] Australia's credibility when commenting on human rights abuses in other jurisdictions."[142]

V. Conclusion

This article has argued that there is much value and benefit to opening the drafting process surrounding a bill of rights to outside ideas and comparative data. Beyond increasing awareness and challenging preconceptions, such an approach provides a more robust and grounded domestic debate, and can facilitate an outcome that provides reasons and justifications for decisions. Taken together, these measures ultimately can help establish the foundation for fewer surprises down the road.

As the last Western democracy without some form of a bill of rights or similar instrument, Australia finds itself in an awkward, but potentially enviable, position. On the one hand, its citizens lack a clear understanding and expression of their rights and freedoms,[143] and the country itself risks being isolated from developments in similar legal systems and may suffer diminished stature during human rights discussions within international fora.[144] On the other

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[140] Para. 34, *Catch the Fire Ministries v. Islamic Council of Victoria* [2006] VSCA 284.
[141] *Id*.
[142] Australia's National Human Rights Consultation Report has observed that passage of a Human Rights Act would result in improved international standing for Australia. *National Human Rights Consultation Report*, *supra* note 17, xxv.
[143] The National Human Rights Consultation Committee "found a lack of understanding among Australians of what human rights are." *National Human Rights Consultation Report*, *supra* note 17, xvii.
[144] *National Human Rights Consultation Report*, *supra* note 17, xxv.

hand, standing at the threshold of a decision to draft a genuinely Australian human rights instrument holds significant promise: Of empowering citizens through a participatory drafting model, meaningfully engaging with a body of law that has advanced dramatically in the short span of 60 years, and creating a document that adopts not merely existing minimum standards, but that contemplates and accounts for emerging human rights norms as well. Based on Australia's long history of support for international human rights and the findings of the National Human Rights Commission, it is evident that Australians will not settle for an instrument that merely reflects the floor without consideration of the ceiling as well.

In the context of defamation of religion, it is clear that a majority of UN member states support greater protection of religious symbols and beliefs, even if it comes at the expense of freedom of expression and freedom of thought, conscience, and religion or belief. This emerging norm—regardless of whether it is labeled "defamation of religion" or "incitement to religious hatred"—is part of an ongoing debate over the substance of international human rights. Therefore, it should figure in any future deliberations over the content and scope of rights in Australia. By recognizing this issue and accounting for it during the drafting process, Australians can measure their vision of domestic rights against the one emerging on the international level and—if disparities arise—provide the necessary justifications in advance rather than post facto. Undertaking this exercise has the added benefits of helping to flesh out and test more general positions relating to issues including balancing of rights and limitations, and also clarifying potential inconsistencies in Australia's domestic law and foreign policy. Importantly, these advantages should be reproducible with assessments of other similarly emerging norms the drafters chose to investigate.

To be certain, the concept of defamation of religion is fraught with difficulties. However, navigating through these difficulties will ensure an open and participatory process, shine greater light on Australia's national values and identity, and result in a more durable final instrument capable of addressing future challenges.