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In preparation for

***The 2011 Expert Workshops on the Prohibition of Incitement to
National, Racial, or Religious Hatred***

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INTRODUCTION

The European Centre for Law & Justice (“ECLJ”) is an international non-governmental, non-profit organization dedicated to protecting human rights and religious freedom in Europe. The ECLJ has special Consultative Status as an NGO before the United Nations. Also, ECLJ Attorneys have served as counsel in numerous cases before the European Court of Human Rights.

The ECLJ has an affiliate office in Pakistan, which provides legal representation to persecuted minorities in a wide range of cases including blasphemy, religious conversion, and violence against minorities. The Pakistan affiliate office has contributed to the content of this Memorandum by providing analysis of Pakistan’s blasphemy laws and commenting on the suffering that results from the laws’ procedural and substantive problems. The Pakistan affiliate office recommends changes to Pakistan’s blasphemy laws to bring the nation into compliance with international legal standards.

Additionally, the East African Center for Law & Justice (“EACLJ”),¹ which has contributed to this submission with regard to Kenya, is a non-governmental, non-profit organization. Because the EACLJ is active before the national parliament (as one of its many goals) to hear and consider Christians’ views when drafting legislation and policies, contributions from this office provide relevant input as to the application of the International Convention on Civil and Political Rights, articles 19 and 20.

The ECLJ and EACLJ are affiliates of the American Center for Law & Justice (“ACLJ”),² a not-for-profit organization dedicated to the defence of constitutional liberties secured by law. It has also contributed to the content of this Memorandum. The ECLJ, EACLJ, and the ACLJ adhere to the principle that fundamental freedoms and liberties are universal, God-given and inalienable, and must be protected.

The Office of the High Commissioner for Human Rights (“OHCHR”) has engaged four expert consultants who are expected to produce studies of relevant legislative patterns, judicial practices, and different types of policies in different regions of the world “with regard to the concept of incitement to national, racial, or religious hatred,” in preparation for its 2011 expert workshops.³ Specifically, the focus regions will be Europe, Africa, Asia-Pacific, and the Americas. The emphasis of the workshops, as defined in the OHCHR Concept Paper, calls for a review of “what constitutes ‘incitement’ in the sense of article 20 of the ICCPR,” and “how to

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³ *Concept paper on OHCHR’s 2011 Expert workshops on the prohibition of incitement to national, racial or religious hatred* [hereinafter *Concept paper*], http://www2.ohchr.org/english/issues/opinion/articles1920_iccpr/docs/Incitement_Workshops_Concept_Paper.pdf (last visited 22 September 2010); *see also* United Nations Office of the High Commissioner for Human Rights (OHCHR), *2011 Expert workshops on the prohibition of incitement to national, racial or religious hatred*, http://www2.ohchr.org/english/issues/opinion/articles1920_iccpr/ (last visited 22 September 2010).

effectively address it while ensuring full respect for freedom of expression as enshrined in article 19 of the ICCPR” in those specific regions.⁴ As part of the process, the ECLJ submits this Report in response to the invitation of the Office of the High Commissioner for Human Rights, Civil Society Section to contribute and participate, particularly with regard to religious expression.

This ECLJ Report will first discuss the law of the Council of Europe under the European Convention on Human Rights, together with various interpretations by the European Court of Human Rights (“Court”) and Council of Europe policies. Although no system of government is perfect, the European Convention of Human Rights (“ECHR”) and the Court provide one model used to balance expressive rights against the religious feelings of others. This Report will next highlight the relevant constitutional, legislative, and judicial practices, which the ECLJ and its affiliates have observed in various states of the Asia-Pacific and African regions.

FREEDOM OF EXPRESSION IN EUROPE

In Europe, free expression is an essential foundation of democratic society. Freedom of expression is not only a guarantee against the state but also a fundamental principle for life in democracy. Freedom of expression is not an end in itself; it is a means for establishing a democratic society. Its guarantee reveals the existence of such a society. Freedom of expression applies not only to information and ideas that are favorably received or regarded as inoffensive or indifferent, but also to the expression that may offend, shock, or disturb the State or any sector of the population.

Moreover, freedom of thought, conscience, and religion are some of the foundations of a democratic society and are in its religious dimension, some of the most vital elements contributing to form the identity of believers. Importantly, protecting conscience or religious sentiment does not preclude criticizing religions and beliefs. Only the manner of religious exercise is subject to potential regulation by the State. Additionally, the State may be held liable in its obligation to ensure that those who profess their religious beliefs have a peaceful enjoyment of their right to freedom of thought, conscience, and religion.

The substantive content of article 10 of the European Convention on Human Rights (“ECHR”) is comparable to article 19 of the International Covenant on Civil and Political Rights (“ICCPR”).⁵ In practice, applying these articles presents a unique tension between the societal

⁴ *Concept paper, supra* note 3, at 1.

⁵ *Compare*, article 19 of the ICCPR,

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

and individual interest of freedom of expression and a state's interest in regulating "hate speech" that could incite discrimination or crime, disrupt democracy, or endanger public safety or national security. The key textual difference between expressive rights under the ECHR and the ICCPR is that the ICCPR contains an express provision in article 20 requiring that "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law,"⁶ while the ECHR contains no such explicit provision.⁷ Although the ECHR does not contain such an express "hate speech" provision, the European Court of Human Rights (or "Court") has held that in cases of speech that is "judged incompatible with the respect for the freedom of thought, conscience and religion of others," article 9 of the ECHR imposes a responsibility on the state to interfere with that expression.⁸ The Court applies a three-step test to resolve the inherent tension within article 10, and to protect interests articulated in article 9.

A. ECHR, Article 10 Analysis, Generally

The European Court of Human Rights has held that a "uniform conception of the significance of religion in society" is impossible to discern in Europe, and therefore, "it is not possible to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is directed against the religious feelings of others."⁹ As such, a wide margin of appreciation is given to each state "in assessing the existence and extent of the necessity of such interference."¹⁰ The margin of appreciation is, however, not unlimited.¹¹

In reviewing a state's action, the Court will apply a three-step analysis. First, the state's interference must be proscribed by law. Second, the state law must pursue a legitimate societal aim. Lastly, the state must show that the interference was necessary in a democratic society.¹² In

International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 19, U.N. Doc. A/RES/2200A(XXI), (Dec. 16, 1966) [*hereinafter* ICCPR], *available at* <http://www2.ohchr.org/english/law/ccpr.htm>; *with* article 10 of the ECHR,

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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

European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 221 [*hereinafter* ECHR].

⁶ ICCPR, *supra* note 5, art. 20.

⁷ *See, e.g.*, ECHR, *supra* note 5.

⁸ *Otto-Preminger-Institut v. Austria*, 20 September 1994, § 47, Series A no. 295-A.

⁹ *Id.* § 50.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* § 43.

considering whether an action is necessary in a democratic society, the Court will often require that the action meet a “pressing social need” and be “proportionate to the aims pursued.”¹³

B. Case Studies of the Court’s Application of Article 10

1. *Otto-Preminger-Institut v. Austria*

In *Otto-Preminger-Institut v. Austria*, the Court held that the Austrian government’s seizure of a highly offensive film did not violate article 10 because the interference with speech was (1) “prescribed by law,” (2) “pursued a legitimate aim,” and (3) was “necessary in a democratic society” to achieve that aim.¹⁴ Importantly, this case did not involve a simple right to proselytize one’s own faith. Rather, the case involved a malicious attack on another faith, with the intent to ridicule.

In *Otto-Preminger-Institut*, the Institut produced a film which was highly offensive to the Roman Catholic Church.¹⁵ The film viciously attacked Roman Catholicism by including depictions in “which God the Father is presented both in image and in text as a senile, impotent idiot, Christ as a cretin and Mary Mother of God as a wanton lady with a corresponding manner of expression and in which the Eucharist is ridiculed.”¹⁶ The Public Prosecutor charged Otto-Preminger-Institut with “disparaging religious doctrines” under section 188 of the Austrian Penal Code,¹⁷ and the Prosecutor was granted an application to seize the film under section 36 of the Media Act. Under section 33 of the Media Act, the Austrian Regional Court ordered the forfeiture of the film, and an appeal was dismissed by the Austrian court of appeals for lack of standing.¹⁸ The Institut brought its application to the European Court of Human Rights under article 10.¹⁹

In determining that the interference was “prescribed by law” the Court ruled that “it is primarily for the national authorities, notably the courts, to interpret and apply national law.”²⁰ The Court summarily dismissed the claim that section 188 was misapplied and found that “no grounds have been adduced . . . for holding that Austrian law was wrongly applied.”²¹

¹³ *Refah Partisi v. Turkey*, [GC] nos. 41340/98, 41342/98, 41343/98, and 41344/98, § 135 ECHR, 2003-II.

¹⁴ *Otto-Preminger-Institut*, §§ 43, 56–57.

¹⁵ *Id.* § 16.

¹⁶ *Id.*

¹⁷ Section 188 of the Penal Code provided specific penalties for disparaging religious feelings:

Whoever, in circumstances where his behaviour is likely to arouse justified indignation, disparages or insults a person who, or an object which, is an object of veneration of a church or religious community established within the country, or a dogma, a lawful custom or a lawful institution of such a church or religious community, shall be liable to a prison sentence of up to six months or a fine of up to 360 daily rates.

Otto-Preminger-Institut, § 25 (quoting Austrian Penal Code, § 188).

¹⁸ *Otto-Preminger-Institut*, § 17.

¹⁹ *Id.* § 1.

²⁰ *Id.* § 45.

²¹ *Id.*

The Court found that the interference “pursued a legitimate aim,” because in seizing the film the government acted to “protect[] . . . the rights of others.”²² The Court found that under article 9 of the ECHR, “a [s]tate may legitimately consider it necessary to take measures aimed at repressing certain forms of conduct, including the imparting of information and ideas, judged incompatible with the respect for the freedom of thought, conscience and religion of others.”²³ The Court noted that, under article 9, a state not only has the right but also has the “responsibility to ensure the peaceful enjoyment of the right guaranteed under [a]rticle 9 to the holders of those beliefs and doctrines.”²⁴ Importantly, Austria’s interference with the Applicant’s speech pursued a legitimate aim under articles 9 and 10, because “[t]he respect for the religious feelings of believers as guaranteed in [a]rticle 9 can legitimately be thought to have been violated by *provocative portrayals of objects of religious veneration*; and such portrayals can be regarded as *malicious* violation of the spirit of tolerance.”²⁵ Furthermore, the “purpose was to protect the right of citizens not to be insulted in their religious feelings.”²⁶

Moreover, in this particular case, the Court found that the interference was “necessary in a democratic society” because there was a “pressing social need for the preservation of religious peace.”²⁷ While acknowledging that freedom of expression “constitutes one of the essential foundations of a democratic society,” the Court held that, “as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent *improper attacks* on objects of religious veneration, provided always that any ‘formality’, ‘condition’, ‘restriction’ or ‘penalty’ imposed be proportionate to the legitimate aim pursued.”²⁸ Notably, what constitutes a permissible or impermissible interference with freedom of expression *may vary* depending on the conception and needs of the society within a particular state or region.²⁹ Therefore, “a certain margin of appreciation” is left to the national authorities within each state.³⁰

States’ margin of appreciation, however, is not without limit. Any interference with freedom of expression as guaranteed by article 10 must be *strictly* supervised by the Court and “[t]he necessity of any restriction must be convincingly established.”³¹

The Court summed up the tension between freedom of expression and necessary interference with that freedom:

The issue before the Court involves weighing up the conflicting interests of the exercise of two fundamental freedoms guaranteed under the Convention, namely the right of the applicant association to impart to the public controversial views

²² *Id.* § 48.

²³ *Id.* § 47.

²⁴ *Id.*

²⁵ *Id.* (emphasis added).

²⁶ *Id.* §48.

²⁷ *Id.* § 52.

²⁸ *Id.* § 49 (emphasis added).

²⁹ *Id.* § 50.

³⁰ *Id.*

³¹ *Id.*

and, by implication, the right of interested persons to take cognisance of such views, on the one hand, and the right of other persons to proper respect for their freedom of thought, conscience and religion, on the other hand. In so doing, regard must be had to the margin of appreciation left to the national authorities, whose duty it is in a democratic society also to consider, within the limits of their jurisdiction, the interests of society as a whole.³²

In holding that the Austrian courts were justified in concluding that the interest of society as a whole required interference with the Institut's freedom of expression, the Court specifically considered the regional religion³³—an overwhelming majority of Tyroleans were Roman Catholic (87%).³⁴ Furthermore, the Court found the expression sufficiently public to cause offence (and hence, a pressing social need), because “[t]here was sufficient public knowledge of the subject-matter and basic contents of the film to give a clear indication of its nature.”³⁵ Here, the Court noted that, under the circumstances of the case, the national authorities were “better placed than the international judge[] to assess the need for such a measure in light of the situation obtaining locally at a given time.”³⁶ Thus, by seizing the film, the Austrian government did not overstep its margin of appreciation because the government “acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner.”³⁷

2. *Refah Partisi v. Turkey*

In *Refah Partisi v. Turkey*, the Grand Chamber considered the claims brought by a Turkish political party, Refah Partisi (the Welfare Party—“Refah”), and three Turkish nationals affiliated with Refah (collectively, “Refah”). Refah alleged that the Turkish Constitutional Court breached articles 9, 10, 11, 14, 17, and 18 of the ECHR when Turkey's Constitutional Court dissolved the party “on the grounds that it was a ‘centre’ (mihrak) of activities contrary to the principles of secularism.”³⁸ The specific remarks and activities in controversy included calls by key Refah leaders for replacing the Republic's statute law with Shari'a law by force and violence. For example, Refah's chairman, in 1994, advocated setting up a theocratic regime during a speech to the Parliament. When describing the inevitable change to be brought by Refah, he asked Parliament whether “the transition [would be] peaceful or violent” and whether it would be “achieved harmoniously or by bloodshed?”³⁹ Another MP in Refah publicly argued that a jihad would be necessary to set Islamic law in place.⁴⁰ Another MP having Refah's support publicly predicted the annihilation of non-Muslims when Shari'a supporters came to power.⁴¹

³² *Id.* § 55.

³³ *Id.* § 56.

³⁴ *Id.* § 52.

³⁵ *Id.* § 54.

³⁶ *Id.* § 56.

³⁷ *Id.*

³⁸ *Refah Partisi v. Turkey*, [GC] nos. 41340/98, 41342/98, 41343/98 and 41344/98, §§ 2, 12, ECHR 2003-II.

³⁹ *Id.* §31.

⁴⁰ *Id.* § 33.

⁴¹ *Id.* § 34.

Furthermore, Refah's leadership publicly advocated wearing Islamic headscarves in State schools and public administrative authority buildings; however, the Constitutional Court, the Supreme Administrative Court, and the European Commission of Human Rights all had already ruled against this practice as it infringed Turkey's principle of secularism.⁴² Even the chairman, in 1996, had "emphasised the importance of television as an instrument of propaganda in the holy war being waged in order to establish Islamic order."⁴³ The chairman specifically argued that "television plays the role of artillery or an air force in the jihad, that is the war for domination of the people."⁴⁴

The Grand Chamber held that Refah's dissolution did not violate article 11 of the ECHR.⁴⁵ As all parties agreed that there had been an "interference" with Refah's associational right under article 11, the Grand Chamber reached its decision by analyzing whether Turkey's interference with Refah's freedom of association was justified under article 11. To be justified, the interference must be prescribed by law; it must meet the legitimate aims listed in paragraph 2 (those which are "in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others"); and it must be "necessary in a democratic society" for the achievement of those aims.⁴⁶

First, the Grand Chamber determined that the Turkish Constitution prescribed the interference since the Constitution allowed the Turkish Constitutional Court to dissolve an anti-secular political party.⁴⁷ The Grand Chamber held next that the interference met a legitimate aim under article 11. Although the applicants questioned Turkey's motives (arguing that Turkey actually sought to oppose Refah because of major business and military concerns rather than a threat to secularism), Refah failed to produce sufficient evidence in this respect.⁴⁸ Instead, the Grand Chamber concluded that Turkey's action to dissolve Refah "pursued several of the legitimate aims listed in [a]rticle 11, namely protection of national security and public safety, prevention of disorder or crime and protection of the rights and freedoms of others."⁴⁹

Finally, the Court concluded that Turkey's interference was necessary in a democratic society because it met a "pressing social need" and was "proportionate to the aims pursued."⁵⁰ The Court first acknowledged the essential importance of political speech and parties to democracy; however, the Court simultaneously noted that "political parties differ from other organisations which intervene in the political arena."⁵¹ Political parties are unique in that they not only propose societal models, but they have the power to implement those proposals once

⁴² *Id.* §§ 12, 27.

⁴³ *Id.* § 44.

⁴⁴ *Id.* § 39.

⁴⁵ *Id.* § 136. The Court also noted that an analysis of the other breaches of the Convention were not necessary since they concerned the same facts examined under article 11. *Id.* § 137.

⁴⁶ *Id.* § 50-51.

⁴⁷ *Id.* § 63-64.

⁴⁸ *Id.* §§ 65-67.

⁴⁹ *Id.* § 67.

⁵⁰ *Id.* § 135.

⁵¹ *Id.* § 87.

they come to power.⁵²

In discussing generally applicable principles, the Court explained that, especially in the context of political parties that ensure pluralism and democracy, the “protection of opinions and the freedom to express them within the meaning of [a]rticle 10 of the Convention is one of the objectives of the freedoms of assembly and association enshrined in [a]rticle 11.”⁵³ Thus, even information or ideas that offend, shock, or disturb must be protected to preserve pluralism, without which there is no democracy.⁵⁴ Furthermore, article 9 protections for the freedom of thought, conscience and religion make up one of the foundations of a democratic society,⁵⁵ but “an attitude which fails to respect [the principle of secularism] will not necessarily be accepted as being covered by the freedom to manifest one’s religion and will not enjoy the protection of [a]rticle 9 of the Convention.”⁵⁶ Considering these principles, the Court explained that “the State may decide to impose on its serving or *future* civil servants, who will be required to wield a portion of its sovereign power, the duty to refrain from taking part in the Islamic fundamentalist movement, whose goal and plan of action is to bring about the pre-eminence of religious rules.”⁵⁷ As the Court explained, “[t]he freedoms guaranteed by [a]rticle 11, and by [a]rticles 9 and 10 of the Convention, cannot deprive the authorities of a State in which an association, through its activities, jeopardises that State’s institutions, of the right to protect those institutions.”⁵⁸ Political parties may, however, exercise their Convention rights within the following parameters set forth by the Grand Chamber:

[T]he Court considers that a political party may promote a change in the law or the legal and constitutional structures of the State on two conditions: firstly, the means used to that end must be legal and democratic; secondly, the change proposed must itself be compatible with fundamental democratic principles. It necessarily follows that a political party whose leaders incite to violence or put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the Convention’s protection against penalties imposed on those grounds[.]⁵⁹

These principles understood, the exceptions contained in article 11 are to be construed *strictly*—“only convincing and compelling reasons can justify restrictions on such parties’ freedom of association,” and “Contracting States have only a limited margin of appreciation.”⁶⁰ Furthermore, the Court must exercise “rigorous supervision” in this arena; dissolving an entire political party (together with barring political leaders’ activities for a certain period of time) is a

⁵² *Id.*

⁵³ *Id.* § 88.

⁵⁴ *Id.* § 89.

⁵⁵ *Id.* § 90.

⁵⁶ *Id.* § 93.

⁵⁷ *Id.* § 94 (emphasis added).

⁵⁸ *Id.* § 96.

⁵⁹ *Id.* § 98 (citations omitted).

⁶⁰ *Id.* § 100.

“drastic measure” and “may only be taken in the most serious cases.”⁶¹ Moreover, a political party’s platform cannot be measured apart from the party leaders’ actual conduct and positions defended.⁶² On the other hand, States need not wait for a party’s actual implementation of policies that are incompatible with the standards of the Convention and democracy; the “danger of that policy for democracy [need only be] sufficiently established and imminent.”⁶³

The Grand Chamber next analysed whether, under these guiding principles, Refah’s dissolution met a pressing social need. Thus, the Court considered the following factors:

(i) whether there was plausible evidence that the risk to democracy, supposing it had been proved to exist, was sufficiently imminent; (ii) whether the acts and speeches of the leaders and members of the political party concerned were imputable to the party as a whole; and (iii) whether the acts and speeches imputable to the political party formed a whole which gave a clear picture of a model of society conceived and advocated by the party which was incompatible with the concept of a “democratic society”.⁶⁴

The Court found an imminent risk to democracy because the 1997 polls and predictions indicated “a considerable rise in Refah’s influence as a political party and its chances of coming to power alone,” despite the uncertain nature of opinion polls. The polls forecasted sixty-seven percent of the votes for Refah in a general election within four years, up from a forecasted thirty-eight percent in 1997.⁶⁵ The Court believed, due to the evidence reviewed, that Turkey’s actions were justified because of the “real chances that Refah would implement its programme after gaining power,” thus making the “danger more tangible and more immediate.”⁶⁶

As to whether the acts and statements of the individuals could be contributed to the Party as a whole, the Court found that statements made by the chairman, the vice-chairman, MPs and other officials elected on Refah’s platform, could legitimately be attributed to the Party.⁶⁷ The chairman’s statements, for example, were “incontestably” attributable to Refah in that the chairman is “frequently a party’s emblematic figure.”⁶⁸ MP statements, “when viewed in the aggregate” can be attributable to the Party unless the speaker distances himself from the Party in making the statements. No distancing occurred in this case.⁶⁹ The Court scrutinized all the statements made by the various Refah leaders and concluded that “these remarks and stances of Refah’s leaders formed a whole and gave a clear picture of a model conceived and proposed by the party of a State and society organized according to religious rules.”⁷⁰ Furthermore, the Court

⁶¹ *Id.*

⁶² *Id.* § 101.

⁶³ *Id.* § 102.

⁶⁴ *Id.* § 104.

⁶⁵ *Id.* § 107.

⁶⁶ *Id.* § 110.

⁶⁷ *Id.* §§ 111–115.

⁶⁸ *Id.* § 113.

⁶⁹ *Id.* §§ 115, 131.

⁷⁰ *Id.* § 122.

also noted that historical political movements based on religious fundamentalism (such as the prior Islamic theocratic regime under Ottoman law in Turkey) have succeeded in seizing political power and setting up new regimes; thus, in light of historical experience, the Court held that “States may oppose such political movements.”⁷¹

Thus, overall, the Grand Chamber agreed that Turkey interfered based upon a pressing social need. The “acts and speeches revealed Refah’s long-term policy of setting up a regime based on sharia within the framework of a plurality of legal systems and . . . Refah did not exclude recourse to force in order to implement its policy and keep the system it envisaged in place.”⁷² Because “these plans were incompatible with the concept of a ‘democratic society’” and because of the imminent and tangible opportunity Refah had to set its plans in motion, the State’s dissolution of Refah met a “pressing social need,” despite Turkey’s narrow margin of appreciation.⁷³ Moreover, the Court found the actions taken were proportionate, where only 5 MPs temporarily forfeited their office and leadership roles (leaving 152 MPs remaining unaffected).⁷⁴ Other damages claimed by the remaining applicants were temporary (barred only five years from certain political activity), and the Court found claims for loss of earnings speculative.⁷⁵

In sum, under the ECHR, political parties are permitted to suggest changes to the fundamental democratic system of a state as long as they use democratic means to implement those changes, and as long as the change itself is compatible with fundamental democratic principles. If a political party crosses the line of posing a threat to democracy, then the ECHR cannot be used to protect anti-democratic activities and ideals—state action must be “necessary in a *democratic society*.” Therefore, the Court rejected Refah’s desire to claim protection under the ECHR—a document enacted through democratic means and committed to the protection of democracy—as Refah’s desire to implement an Islamic regime directly conflicted with a democratic society.

3. *Giniewski v. France*

Mr. Paul Giniewski was convicted in a French court for publishing an article that allegedly contained racially defamatory statements against Christians.⁷⁶ The article argued that the Catholic doctrine of fulfillment of the Old Covenant into the New Covenant “prepared the ground in which the idea and implementation of Auschwitz took seed.”⁷⁷ The French criminal court found that this statement made the horrors of Auschwitz a “direct extension of one of the core doctrines of the Catholic faith . . . and thus directly engages the responsibility of Catholics, and . . . Christians.”⁷⁸ Giniewski argued that his criminal conviction had violated his right to

⁷¹ *Id.* § 124.

⁷² *Id.* § 132.

⁷³ *Id.*

⁷⁴ *Id.* § 133.

⁷⁵ *Id.* § 134.

⁷⁶ *Giniewski v. France*, no. 64016/00, §§ 14–15, ECHR 2006-I.

⁷⁷ *Id.* § 14.

⁷⁸ *Id.* § 16.

freedom of expression under article 10 of the ECHR.⁷⁹

The Court applied the three-step test to determine if Giniewski's right to freedom of expression had been violated under article 10. The Court analyzed whether the interference was (1) prescribed by law, (2) pursued a legitimate aim under article 10, and (3) was necessary in a democratic society.⁸⁰ First, the fact that the interference was prescribed by France's Freedom of the Press Act was undisputed.⁸¹ Second, the Court listed the aim of protecting "the reputation or rights of others" under article 10 as the legitimate aim pursued by France's interference with Giniewski's right to freedom of expression.⁸² The Court then turned to analyse whether the interference was necessary in a democratic society.

The Court analysed whether the interference was necessary in a democratic society by looking at whether it met a "pressing social need" and was "proportionate to the legitimate aim pursued."⁸³ In so doing, the Court noted that Giniewski's article contributed to a popular debate regarding possible origins of the Holocaust.⁸⁴ The Court determined that this debate should be allowed to take place freely since it was essential to a democratic society.⁸⁵ The debate was considered essential because the debate sought historical truth.⁸⁶ The Court distinguished this case from *Otto-Preminger-Institut* by stating that Giniewski's article was not as "gratuitously offensive" compared to the film in *Otto-Preminger-Institut*.⁸⁷ In light of these factors, the Court determined that France's interference with Giniewski's right to freedom of expression did not meet a pressing social need.⁸⁸ Also, the penalties imposed on Giniewski were deemed disproportionate in light of the importance of the debate in which Giniewski contributed.⁸⁹ As a result of these findings, the Court ruled that France's interference violated article 10 of the ECHR.⁹⁰ The Court concluded that, because of the content of Giniewski's article, Giniewski's written statements were necessary to a democratic society because the statements encouraged public debate.

4. *Gündüz v. Turkey*

The applicant, Mr. Müslüm Gündüz, appeared on a live television broadcast in his capacity as the leader of an Islamic sect to discuss and debate his sect's views and beliefs.⁹¹ Turkish courts convicted Gündüz of making criminal statements on the broadcast that "incited

⁷⁹ *Id.* § 26.

⁸⁰ *Id.* § 38.

⁸¹ *Id.* § 39.

⁸² *Id.* §§ 40–42.

⁸³ *Id.* § 44.

⁸⁴ *Id.* § 50.

⁸⁵ *Id.* § 51.

⁸⁶ *Id.*

⁸⁷ *Id.* § 52.

⁸⁸ *Id.* § 53.

⁸⁹ *Id.* § 55.

⁹⁰ *Id.* § 56.

⁹¹ *Gündüz v. Turkey*, no. 35071/97, §§ 10–11, ECHR 2003-XI.

the people to hatred and hostility on the basis of a distinction founded on religion.”⁹² Gündüz had called democracy in Turkey “despotic, merciless, impious[,] . . . [and] hypocritical.”⁹³ Gündüz also declared his sect would destroy democracy and set up a regime based on Shari’a law.⁹⁴ Finally, Gündüz called a child born of parents wed by a council official (instead of in a religious ceremony) a *piç* (an illegitimate child).⁹⁵ Gündüz argued that his conviction violated article 10 of the ECHR, which protects the right to freedom of expression.⁹⁶

The interference with Gündüz’s freedom of expression would be justified only if the interference was (1) prescribed by law, (2) pursued a legitimate aim referred to in article 10, and (3) necessary in a democratic society.⁹⁷ Although, in this case, there was no dispute as to whether the speech was “prescribed by law” and whether the government had a “legitimate aim,”⁹⁸ the Court considered whether Turkey’s interference was “necessary in a democratic society.”

Even affording Turkey its “certain margin of appreciation [that] is generally available to the Contracting States when regulating freedom of expression,”⁹⁹ the Court disagreed that Turkey’s restriction met a pressing social need, or that the interference was proportionate to the legitimate aim pursued.¹⁰⁰ In this case, the Court considered each of the applicant’s statements under article 10 and found each statement protected. The allegations of hypocrisy and threats against democracy were not calls to violence or hate speech.¹⁰¹ Likewise, Gündüz’s statement about illegitimate children also found protection under article 10, because it was part of a heated public debate.¹⁰² As such, the Court determined that Turkey interfered with Gündüz’s freedom of expression.¹⁰³ In so doing, the Court noted that the interference did not meet a pressing social need as in *Refah Partisi*, because it found there was no imminent threat of Gündüz’s sect seizing power and implementing Shari’a law (like the imminent threat of Refah seizing power).¹⁰⁴ Although careful to explain that “hate speech” is not protected under article 10, the Court explained the narrow application of this case to those speaking in legitimate public debate:

Admittedly, there is no doubt that, like any other remark directed against the Convention’s underlying values, expressions that seek to spread, incite or justify hatred based on intolerance, including religious intolerance, do not enjoy the protection afforded by [a]rticle 10 of the Convention. However, the Court considers that the mere fact of defending sharia, *without calling for violence to*

⁹² *Id.* § 13.

⁹³ *Id.* § 15.

⁹⁴ *Id.*

⁹⁵ *Id.* §§ 11, 15.

⁹⁶ *Id.* § 25.

⁹⁷ *Id.* § 26.

⁹⁸ *Id.* §§ 27–28.

⁹⁹ *Id.* § 37.

¹⁰⁰ *Id.* § 38.

¹⁰¹ *Id.* §§ 48, 50.

¹⁰² *Id.* § 49.

¹⁰³ *Id.* §§ 52–53.

¹⁰⁴ *Id.* § 51.

establish it, cannot be regarded as “hate speech”. Moreover, the applicant’s case should be seen in a very particular context. Firstly, as has already been noted (see paragraph 43 above), the aim of the programme in question was to present the sect of which the applicant was the leader; secondly, the applicant’s extremist views were already known and had been discussed in the public arena and, in particular, were counterbalanced by the intervention of the other participants in the programme; and lastly, they were expressed in the course of a pluralistic debate in which the applicant was actively taking part. Accordingly, the Court considers that in the instant case the need for the restriction in issue has not been established convincingly.¹⁰⁵

C. Relevant Council of Europe Reports and Recommendations

In Recommendation No. R (97) 20, the Council of Europe’s Committee of Ministers¹⁰⁶ defined the scope of hate speech to cover “all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance.”¹⁰⁷ The Committee of Ministers further recommended that member states

should establish or maintain a sound legal framework consisting of civil, criminal and administrative law provisions on hate speech which enable administrative and judicial authorities to reconcile in each case respect for freedom of expression with respect for human dignity and the protection of the reputation or the rights of others.¹⁰⁸

On one hand, such a legal framework must insure that “interferences with freedom of expression are narrowly circumscribed . . . applied in a lawful and non-arbitrary manner on the basis of objective criteria . . . [and] subject to independent judicial control.”¹⁰⁹ On the other hand,

[n]ational law and practice should allow the courts to bear in mind that specific instances of hate speech may be so insulting to individuals or groups as not to enjoy the level of protection afforded by [a]rticle 10 of the European Convention on Human Rights to other forms of expression. This is the case where hate speech is aimed at the destruction of the rights and freedoms laid down in the Convention or at their limitation to a greater extent than provided therein.¹¹⁰

In a later recommendation, Recommendation 1805 (2007), the Parliamentary Assembly addressed the topics of “[b]lasphemy, religious insults and hate speech against persons on

¹⁰⁵ *Id.* (emphasis added).

¹⁰⁶ Council of Europe, *Recommendation No. R. (97)20 of the Comm. of Ministers to Member States on “Hate Speech”*, No. R (97) 20, (Oct. 30 1997), available at, <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=568168&SecMode=1&DocId=582600&Usage=2>.

¹⁰⁷ *Id.* app., at scope.

¹⁰⁸ *Id.* app., at princ. 2.

¹⁰⁹ *Id.* app., at princ. 3.

¹¹⁰ *Id.* app., at princ. 4.

grounds of their religion.”¹¹¹ The Assembly first recognized the importance freedom of expression by stating that,

[f]reedom of expression is not only applicable to expressions that are favourably received or regarded as inoffensive, but also to those that may shock, offend or disturb the state or any sector of population within the limits of [a]rticle 10 of the Convention. Any democratic society must permit open debate on matters relating to religion and religious beliefs.¹¹²

Although affirming that in some instances it may be necessary to restrict freedom of expression and that “national authorities may need to adopt different solutions taking account of the specific features of each society”,¹¹³ the Assembly emphasized that blasphemy should not be considered a criminal offence:

With regard to blasphemy, religious insults and hate speech against persons on the grounds of their religion, the state is responsible for determining what should count as criminal offences within the limits imposed by the case law of the European Court of Human Rights. In this connection, the Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence.¹¹⁴

The Parliamentary Assembly further stated its position regarding mere critical statements about others’ religion:

[I]n a democratic society, religious groups must tolerate, as must other groups, critical public statements and debate about their activities, teachings and beliefs, provided that such criticism does not amount to intentional and gratuitous insults or hate speech and does not constitute incitement to disturb the peace or to violence and discrimination against adherents of a particular religion. Public debate, dialogue and improved communication skills of religious groups and the media should be used in order to lower sensitivity when it exceeds reasonable levels.¹¹⁵

Supporting its recommendation that blasphemy should not be considered a criminal offence, the Assembly noted that blasphemy laws have been used in the past in a manner that “reflected the dominant position of particular religions in individual states.”¹¹⁶ To further “greater diversity of religious beliefs in Europe and the democratic principle of the separation of state and religion, [the Parliamentary Assembly recommended that] blasphemy laws should be

¹¹¹ Eur. Parl. Ass. Recommendation, *Blasphemy, religious insults and hate speech against persons on grounds of religion*, Doc. No. 1805 (29 June 2007), available at <http://assembly.coe.int/Documents/AdoptedText/ta07/EREC1805.htm>.

¹¹² *Id.* § 1.

¹¹³ *Id.* § 3.

¹¹⁴ *Id.* § 4.

¹¹⁵ *Id.* § 5.

¹¹⁶ *Id.* § 10.

reviewed by the governments and parliaments of the member states.”¹¹⁷ Furthermore, in implementing any blasphemy related legislation, the Recommendation qualified that all member states “must insure that members of a particular religion are neither privileged nor disadvantaged under blasphemy laws and related offenses.”¹¹⁸

Additionally, the Assembly made clear that freedom of religion is still fully protected by article 9 of the ECHR, and member states have an obligation under article 9 to protect “the freedom to manifest one’s religion.”¹¹⁹ In striking a fair balance regarding an individual’s right to “expressions about religious matters,” “national law should only penalize expressions . . . which intentionally and severely disturb public order and call for public violence.”¹²⁰

Notably, the European Commission for Democracy Through Law (“Venice Commission”) later adopted a Report in October 2008, considering, among numerous sources, both the Committee of Ministers’ Recommendation No. R (97) 20, as well as the Parliamentary Assembly’s Recommendation 1805 (2007). The Venice Commission Report, *On the Relationship Between Freedom of Expression and Freedom of Religion: The Issue of Regulation and Prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred*,¹²¹ considered both European and international law on these topics and primarily concluded, pertaining to “Incitement to Hatred” laws, that “incitement to hatred, including religious hatred, should be the object of criminal sanctions as is the case in almost all European States . . . In the Commission’s view, it would be appropriate to introduce an explicit requirement of intention or recklessness, which only few States provide for.”¹²²

The Commission further concluded, however, that “it is neither necessary nor desirable to create an offence of religious insult (that is, insult to religious feelings) simpliciter, without the element of incitement to hatred as an essential component.”¹²³ Moreover, the Venice Commission determined that “the offence of blasphemy should be abolished (which is already the case in most European States) and should not be reintroduced.”¹²⁴ In employing its conclusions, however, the Venice Commission strongly emphasised that it did not intend for “democratic societies to become hostage to the excessive sensitivities of certain individuals: *freedom of expression must not indiscriminately retreat when facing violent reactions.*”¹²⁵ In this regard, the Commission further concluded that open debate was necessary in a democratic society:

¹¹⁷ *Id.*

¹¹⁸ *Id.* § 11.

¹¹⁹ *Id.* §§ 13–14.

¹²⁰ *Id.* §§ 14–15.

¹²¹ Council of Europe, European Commission for Democracy Through Law (Venice Commission), Report *On the Relationship Between Freedom of Expression and Freedom of Religion: The Issue of Regulation and Prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred* (Venice, 17-18 October 2008) (Study no. 406/2006), available at [http://www.venice.coe.int/docs/2008/CDL-AD\(2008\)026-e.pdf](http://www.venice.coe.int/docs/2008/CDL-AD(2008)026-e.pdf).

¹²² *Id.* § 89.a.

¹²³ *Id.* § 89.b.

¹²⁴ *Id.* § 89.c.

¹²⁵ *Id.* § 96 (emphasis added).

The level of tolerance of these individuals and of anyone who would feel offended by the legitimate exercise of the right to freedom of expression should be raised. A democracy must not fear debate, even on the most shocking or anti-democratic ideas. It is through open discussion that these ideas should be countered and the supremacy of democratic values be demonstrated. Mutual understanding and respect can only be achieved through open debate. Persuasion, as opposed to ban or repression, is the most democratic means of preserving fundamental values.¹²⁶

Open debate in Europe preserves the Freedom of Expression protected under article 10 of the ECHR. As the Venice Commission explained, even extreme views are protected:

In the Commission's view, however, in a true democracy imposing limitations on freedom of expression should not be used as a means of preserving society from dissenting views, even if they are extreme. Ensuring and protecting open public debate, should be the primary means of protecting inalienable fundamental values such freedom of expression and religion at the same time as protecting society and individuals against discrimination. It is only the publication or [utterance] of *those ideas which are fundamentally incompatible* with a democratic regime because they incite to hatred that should be prohibited.¹²⁷

Those ideas that are fundamentally incompatible might include gratuitously offensive expression. For example, recognizing the European Court of Human Rights' decisions, such as *Otto-Preminger-Institut v. Austria* (discussed herein), the Commission supported its conclusions pertaining to public debate by noting that states are obligated to,

avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs. . . . Respect for the religious feelings of believers can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration or offensive attacks on religious principles and dogmas; these may in certain circumstances be regarded as malicious violation of the spirit of tolerance, which must also be a feature of a democratic society.¹²⁸

Emphatically, "statements which are fundamentally incompatible with a democratic regime" *do not* include mere disagreement about points of truth. As the Venice Commission recognized, "the responsibility that is implied in the right to freedom of expression does not, as such, mean that an individual is to be protected from exposure to a religious view simply because it is not his or her own."¹²⁹ Rather, *individuals*, and not the belief system itself, are afforded protection.¹³⁰ Thus,

¹²⁶ *Id.* § 97.

¹²⁷ *Id.* § 46 (emphasis added).

¹²⁸ *Id.* § 47 (footnote omitted).

¹²⁹ *Id.* § 49.

¹³⁰ *Id.*

“[t]he right to freedom of expression implies that it should be allowed to scrutinise, openly debate, and criticise, *even harshly and unreasonably*, belief systems, opinions, and institutions, as long as this does not amount to advocating hatred against an individual or groups.”¹³¹

To determine what is “necessary in a democratic society,” insofar as permissible restrictions may be concerned, the Commission reiterated what the European Court of Human Rights has determined: “State authorities [that enjoy a certain but not unlimited margin of appreciation] are . . . better placed than the international judge to appreciate what is ‘necessary in a democratic society.’”¹³² This deference is given due to the lack of uniformity throughout Europe as to “[w]hat is likely to cause substantial offence to persons of a particular religious persuasion”; those factors “will vary significantly from time to time and from place to place.”¹³³ However, there remains a prevailing concern regarding the potential for disproportionate application of hate legislation:

The application of hate legislation must be measured in order to avoid an outcome where restrictions which potentially aim at protecting minorities against abuses, extremism or racism, *have the perverse effect of muzzling opposition and dissenting voices, silencing minorities, and reinforcing the dominant political, social and moral discourse and ideology.*¹³⁴

When analyzing statements, the Commission set forth certain elements that must be considered: “[T]he context in which it is made; the public to which it is addressed; [and] whether the statement was made by a person in his or her official capacity, in particular if this person carries out particular functions.”¹³⁵ Additionally, pertaining to content, the Commission highlighted where the line should be drawn:

[I]n a democratic society, religious groups must tolerate, as other groups must, critical public statements and debate about their activities, teachings and beliefs, *provided that such criticism does not amount to incitement to hatred and does not constitute incitement to disturb the public peace or to discriminate against adherents of a particular religion.*¹³⁶

The Venice Commission also explained its preference for existing causes of action, including such remedies as damages, over criminal sanctions for violations. The Commission was careful to explain “that it must be possible to criticise religious ideas, even if such criticism may be perceived by some as hurting their religious feelings. Awards of damages should be carefully and strictly justified and motivated and should be proportional, lest they should have a chilling effect on freedom of expression.”¹³⁷

¹³¹ *Id.* (emphasis added).

¹³² *Id.* § 51.

¹³³ *Id.*

¹³⁴ *Id.* § 58 (emphasis added).

¹³⁵ *Id.* § 69.

¹³⁶ *Id.* § 72.

¹³⁷ *Id.* § 76.

PAKISTAN

A. Introduction

Under the United Nations' International Covenant on Civil and Political Rights, which Pakistan has recently ratified,¹³⁸ article 20 expressly prohibits any "advocacy of . . . religious hatred that constitutes incitement to discrimination, hostility or violence."¹³⁹ This provision directly affects article 19's guarantee of freedom of expression and freedom to discuss and hold ideas.¹⁴⁰ Although Pakistan has entered a reservation in which it promises to enforce article 19 only in conformance with Pakistan's Constitution and Shari'a law,¹⁴¹ it remains bound by its alleged commitment under article 20 to prevent "religious hatred that constitutes incitement."¹⁴²

Since the implementation of blasphemy laws during the 1980s and due almost entirely to their discriminatory and over-inclusive nature, Pakistan has failed to achieve the proper balance between free expression and public order, the stated purpose for blasphemy laws.¹⁴³ The country's blasphemy laws have redefined "religious hatred that constitutes incitement" as anything that may "incite" a Muslim to be offended on behalf of Islam. Contrary to the purpose of maintaining public order, these broad and discriminatory laws have actually created greater public disorder by fostering violent outbursts against even the most innocent and ambiguous comments. In effect, these laws—by being discriminatory and too broad—have defined "blasphemy" to include nearly every non-Muslim idea, word, or action, whether objectively blasphemous or not.¹⁴⁴ Since the Zia Amendments to the Pakistani Penal Code, Muslims have been abusing the country's blasphemy laws to settle personal scores by making false accusations that are difficult to defend.¹⁴⁵ Instead of focusing solely on the general abuses of the law through false accusations, this section will emphasize the technical errors in the current blasphemy laws (procedural and substantive) and the Pakistani courts' dangerous interpretation of these laws.

¹³⁸ Pakistan ratified the ICCPR as of 23 June 2010. United Nations, Treaty Collection, Status of Treaties [*hereinafter* U.N. Status of Treaties], http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Sept. 23, 2010).

¹³⁹ ICCPR, *supra* note 5, art. 20.

¹⁴⁰ ICCPR, *supra* note 5, art. 19.

¹⁴¹ U.N. Status of Treaties, *supra* note 138.

¹⁴² ICCPR, *supra* note 5.

¹⁴³ *See id.* art. 19(3) ("The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.").

¹⁴⁴ *See* discussion, *infra*, sections D and E (detailing the abuse of blasphemy laws to persecute non-Muslims).

¹⁴⁵ *See infra* note 200 and accompanying text.

B. Original Blasphemy Laws Enacted by the British in the Indian Subcontinent Were Designed to Maintain Peace Between People from Diverse Religious Backgrounds and Not To Protect a Particular Religion from Criticism or Suppress Religious Discussion.

In 1860, the British Empire implemented Pakistan’s original blasphemy laws as part of a penal code designed to ensure and maintain peace between the diverse religions present in the Indian subcontinent.¹⁴⁶ After its inception in 1947, Pakistan made significant amendments to the penal code according to the country’s religion and culture. The original provisions—sections 295, 295-A, 297, and 298—prohibited anyone from insulting another religion through their words or through destroying or defiling religious property.¹⁴⁷ All of these original prohibitions broadly protected *all* religions¹⁴⁸ and were enforced through reasonable punishments.¹⁴⁹ These laws were purposefully constructed to protect the religious sentiments of everyone and were narrowly written only to convict those who *intentionally* outraged another’s feelings.¹⁵⁰ For example, section 295 stated that an individual had to have the “intention of thereby insulting the religion of any class of persons or with the knowledge.”¹⁵¹ Section 295-A required the act against

¹⁴⁶ See INDIAN PEN. CODE OF 1860, §§ 295, 297, available at <http://punjabrevenue.nic.in/crime10.htm#ch15>.

¹⁴⁷ See *id.* §§ 295, 295-A, 297, 298.

§ 295. Injuring or defiling place of worship with intent to insult the religion of any class. Whoever destroys, damages or defiles any place of worship, or any object held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion, shall be punishable with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

§ 295-A. Whoever, with deliberate and malicious intention of outraging the 'religious feelings of any class of the citizens of Pakistan, by words, either spoken or written, or by visible representations insults the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.

§ 297. Trespassing on burial places, etc. Whoever, with intention of wounding the feelings of any person, or of insulting the religion of any person, or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted thereby, commits any trespass in any place of worship or on any place of sculpture, or any place set apart from the performance of funeral rites or as a depository for the remains of the dead, or offers any indignity to any human corpse, or causes disturbance to any persons assembled for the performance of funeral ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

§ 298. Uttering, words, etc., with deliberate intent to wound the religious feelings of any person. Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any words or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places, any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

¹⁴⁸ Section 298 prohibits words with the “deliberate intention of wounding the religious feelings of any person.” *Id.* § 298 (emphasis added).

¹⁴⁹ Punishments varied from one to three years imprisonment. See *id.* §§ 295 (up to two years imprisonment), 295-A (up to three years imprisonment), 297 (up to one year imprisonment), 298 (up to one year imprisonment).

¹⁵⁰ *Id.* § 295.

¹⁵¹ *Id.*

religion to be “deliberate and malicious,”¹⁵² and section 298 required the act to be “deliberately intended” to wound the religious feelings of another.¹⁵³

In the 1962 case of *Khalil v. State*,¹⁵⁴ the Lahore High Court emphasized the strict intent requirements of section 295-A of the Pakistan Penal Code in protecting the free expression rights of a book publisher.¹⁵⁵ In *Khalil*, the Pakistani government brought an order against the Pakistani owner of the Premier Book House for publishing a research book on the development of Muslim theology and legal theory.¹⁵⁶ The government argued the book was written “with deliberate and malicious intention of outraging the religious feelings of different sects of Muslims of Pakistan and Muslims generally” and “attempt[ed] to insult the religious feelings of different sects of Muslims of Pakistan and Muslims in general.”¹⁵⁷ Analyzing the statute, the Court noted, “the word ‘deliberate’ was used to make it a *very purposeful intention* and it was further strengthened by the use of a malicious adjective.”¹⁵⁸ In making this distinction, the Lahore High Court was careful to apply the existing blasphemy statute as narrowly as possible to avoid infringing on the Pakistani book publisher’s free expression rights.¹⁵⁹ After observing these fundamental constitutional rights, the Court concluded that the publisher did not violate section 295-A.¹⁶⁰ The decision of *Khalil* represents that incitement to religious hatred must be fundamentally an intentional and malicious act. This narrow construction is designed to preserve freedom of expression and only suppress genuine blasphemy.

Under the original, un-amended provisions, Pakistan was committed to equally protecting all religious expressions. Islam was not treated any differently. In fact, the Lahore High Court, in *Punjab Religious Book Society, Lahore v. State*,¹⁶¹ recognized that when evaluating alleged violations of section 295-A, the Court must put itself in the place of a “neutral person,” i.e., a party with no religious bias.¹⁶² The Court emphasized that the Pakistani judiciary must consider religious disputes under section 295-A from the objective viewpoint of “normal susceptibilities,” and not from a “hypersensitive” perspective.¹⁶³ Although the High Court in *Punjab Religious Book Society* was sympathetic to the fact that the Christian book in question¹⁶⁴ would “outrage the religious feelings of the Muslims,”¹⁶⁵ the Court rightly acknowledged that the publisher did

¹⁵² *Id.* § 295-A.

¹⁵³ *Id.* § 298.

¹⁵⁴ *Khalil v. State*, (1962) 13 PLD (SC) 850 (Pak.).

¹⁵⁵ *Id.* ¶ 7.

¹⁵⁶ *Id.* ¶ 1.

¹⁵⁷ *Id.* ¶ 3.

¹⁵⁸ *Id.* ¶ 7 (emphasis added).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* ¶ 8.

¹⁶¹ *Punjab Religious Book Society, Lahore v. State*, (1960) 12 PLD (SC) 629 (Pak.).

¹⁶² *Id.* ¶ 9.

¹⁶³ *Id.*

¹⁶⁴ *Punjab Religious Book Society*, 12 PLD at ¶ 3 (“The theme of the book about which the impugned order of forfeiture was passed is a comparison between Islam and Christianity and as was but to be expected the object of the author, who was a Christian, was to show that Christianity was a true religion and Islam was not.”).

¹⁶⁵ *Id.* ¶ 11.

not violate section 295-A because the strict intent requirement of the statute was not satisfied.¹⁶⁶ The Court even ordered the government to pay the opposing party's legal costs because of the severity of the government's errors in bringing the blasphemy suit.¹⁶⁷

The decision of *Punjab Religious Book Society* demonstrates that to convict a person under the 1860 blasphemy laws, the determining factor was whether the speaker had deliberate and malicious intent to incite religious hatred by his intentional blasphemous speech. The listener's subjective beliefs, religious zeal, or personal offence were not dispositive. By focusing on the objectivity of "normal susceptibilities," this standard allowed for vigorous religious discussion while preventing a "hypersensitive" individual's perception from turning objectively innocent comments into blasphemy.

Moreover, these laws were not enacted to protect any single belief but to protect individuals—of whatever ideological or religious affiliation—from insults that an objective, reasonable person would find hurtful. Articles 19 and 20 under the ICCPR were enacted with the same purpose. For example, in *Ross v. Canada*, the Human Rights Committee upheld suppression of the appellant's speech because the Commission found that the goal of the ICCPR provisions was to protect a group of individuals (Jews, in this instance) from objectively offensive statements.¹⁶⁸ In *Ross*, a school teacher was indicted for allegedly making controversial statements and publications defending Christianity against Judaism.¹⁶⁹ A specially established Human Rights Board of Inquiry found that Ross "denigrate[d] the faith and beliefs of Jews and call[ed] upon true Christians to not merely question the validity of Jewish beliefs and teachings but to hold those of the Jewish faith and ancestry in contempt."¹⁷⁰ Ross had "identifie[d] Judiasm as the enemy and call[ed] on all Christians to join the battle," alleging that the "Christian faith and way of life [were] under attack by an international conspiracy in which the leaders of Jewry [were] prominent."¹⁷¹ The Board of Inquiry found that Ross's comments did not constitute "scholarly discussion," because they did not "objectively summarize[] findings," but clearly intended "to attack the truthfulness, integrity, dignity and motives of Jewish persons."¹⁷² As a result of these opinions, the Board found that students were harassing their Jewish classmates by carving swastikas on the desks of Jewish students.¹⁷³ Relying upon its previous decision in *Faurisson v. France*,¹⁷⁴ the Committee upheld restrictions on Ross's speech, not because they valued Judaism itself, but because the Jewish community had a "right to be protected from

¹⁶⁶ *Id.* The Court reasoned that the book was not published with the intention of deliberately and maliciously insulting the religious beliefs of Muslims and therefore did not violate Section 295-A.

¹⁶⁷ *Id.* ¶ 12.

¹⁶⁸ Human Rights Committee, *Ross v. Canada*, Oct. 16, 2000–Nov. 3, 2000, 17th Sess., U.N. Doc. CCPR/C/70/C/736/1997, ¶ 11.5 [hereinafter *Ross*], available at <http://www.unhcr.org/refworld/docid/3f588efc0.html>.

¹⁶⁹ *Id.* ¶¶ 2.1, 2.2. This included television interviews, pamphlets, and books. *Id.*

¹⁷⁰ *Id.* ¶ 4.2.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* ¶ 4.3.

¹⁷⁴ Human Rights Committee, *Faurisson v. France*, Nov. 8 1996, 58th Sess., U.N. Doc. CCPR/C/58/D/550/1993, ¶ 9.6 [hereinafter *Faurisson*].

religious hatred.”¹⁷⁵

If blasphemy laws are to properly insure free expression and still maintain public order, they must not focus on protecting *subjective* feelings and perceptions, or even ideologies. Public order exceptions to free expression are designed to protect adherents of minority religions from the majority’s discrimination and persecution. Public order exceptions should not be used to shield a single favored belief system from the marketplace of discussion and criticism, let alone discriminate against and persecute religious minorities. Unfortunately, this is precisely what Pakistan’s current blasphemy laws accomplish.

C. The Lack of Constitutional, Legislative Involvement in Drafting and Passing the Current Blasphemy Laws has Led to Widespread Abuse, Increased Violence, and Discrimination Against Religious Minorities.

Since 1860, the Pakistani Penal Code has gone through several amendments that have created blasphemy provisions that protect Islam rather than all religions, impose unreasonably harsh penalties, eliminate procedural safeguards, and broaden the scope of blasphemy by eliminating the intent requirement. The most significant of these amendments were implemented by General Muhammad Zia-ul-Haq during his time as a military leader between 1977 and 1988.¹⁷⁶ These amendments revolutionized the area of blasphemy law. From the time Pakistan implemented these laws until 2007, seventy-three of the ninety-six blasphemy law charges came from Zia’s additions.¹⁷⁷

Without proper legislative involvement,¹⁷⁸ General Zia added three significant sections to Pakistan’s Penal Code: section 298-A, which prohibits blaspheming Muslim religious figures; section 295-B, which prohibits desecrating the Qur’an; and section 298-C, which prohibits persons of the Ahmadi faith from posing as Muslims or offending Islam.¹⁷⁹ Later in 1991, the legislature passed section 295-C, which prohibits all blasphemy against Muhammad.¹⁸⁰ Zia passed sections 295-B and 298-A as Ordinances, which are authorized under Pakistan’s Constitution but which also completely bypass the National Assembly legislative process.¹⁸¹ By avoiding the National Assembly, Zia denied the people an opportunity to comment on the laws. More importantly, he also denied the legislature an opportunity to exercise its fundamental functions of critiquing, amending, and properly drafting the laws. The Pakistani Constitution allows the President to use the Ordinance when “necessary to take immediate action,”¹⁸² not as a tool to establish radical, poorly-drafted, and ill-advised amendments to the Penal Code as part of

¹⁷⁵ Ross, *supra* note 168, ¶ 11.5 (citing *Faurisson*, *supra* note 174).

¹⁷⁶ Osama Siddique & 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, 310–11 (2008).

¹⁷⁷ *Id.* at 324–25.

¹⁷⁸ *See id.* at 314 (describing General Zia’s rule as “authoritarian” after he “assumed for himself the power of amending the Constitution”).

¹⁷⁹ PAK. PENAL CODE, ch. XV, §§ 295-B, 298-A, 298-C, *available at* <http://www.pakistani.org/pakistan/legislation/1860/actXLVof1860.html>.

¹⁸⁰ *Id.* § 295-C.

¹⁸¹ PAKISTAN CONST., art. 89, *available at* <http://www.pakistani.org/pakistan/constitution>.

¹⁸² *Id.*

a military coup.

D. Current Blasphemy Laws Discriminate Against Non-Muslims, Broaden the Scope of Incitement, and Encourage Abuse of the Judicial System.

The most recent blasphemy provisions have obliterated the lines established by the courts in *Khalil* and *Punjab Religious Book Society* that protected religious discussion from censorship by those with unreasonable “susceptibilities.” They no longer separate malicious blasphemy from vigorous discussion but now categorize as blasphemy all non-Muslim sentiments that are perceived to be offensive by Muslims.

The new laws radically re-defined “incitement to religious hatred” through a two-step broadening. First, these provisions narrowly protect Islam rather than all religions equally. For example, while section 298 prohibits maliciously offending anyone’s religious feelings, section 298-A now prohibits anyone from speaking against the “holy personages” of Islam.¹⁸³ Although the Pakistani Law Commission and the Islamic Ideological Commission have allegedly attempted to promote protection of more than one religion under the blasphemy laws,¹⁸⁴ no judicial or legislative policies have changed the Code’s preference for protecting only Islam. Second, the new provisions implement strict liability for blasphemy, removing any intent requirement and defining blasphemy so vaguely that subjective third party perception becomes the benchmark. For example, section 298-A has eliminated the intent requirement and created liability for “inadvertently” making a derogatory remark.¹⁸⁵ Similarly, under section 295-C, an individual becomes liable for blasphemy simply by *insinuating* blasphemy.¹⁸⁶ This ambiguity has led to the prosecution of innocent individuals who have said something that their audience somehow finds “derogatory.”¹⁸⁷

These significant changes in blasphemy laws reflect the government’s vigorous commitment to protecting Islam and preserving the order of its Muslim society at the expense of non-Muslim minorities. As an Islamic Republic,¹⁸⁸ Pakistan recognizes Islam as its state religion¹⁸⁹ and requires that “[a]ll existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah . . . and no law shall be enacted which is repugnant to [Islamic] Injunctions.”¹⁹⁰ Although Pakistan’s Constitution explicitly grants freedoms of religion¹⁹¹ and speech,¹⁹² and declares “adequate provisions shall be made for

¹⁸³ Compare *id.* § 298-A (protecting “holy personages” of Islam), with *id.* § 298 (protecting the “the religious feelings of any person”).

¹⁸⁴ *Riaz Ahmad v. State*, (1994) 46 P.L.D. (SC) 485, 495-96 (Pak.).

¹⁸⁵ PAK. PENAL CODE, ch. XV, § 298-A. See, e.g., *Muhammad Mahboob v. State*, (2002) 54 PLD (SC) 587 (Pak.) (professor was arrested and sentenced to death in 2001).

¹⁸⁶ PAK. PENAL CODE, ch. XV, § 298-C.

¹⁸⁷ See First Information Report (FIR), Police Station: Margela, Islamabad, Case of Dr. Younus Shaikh (2000), available at http://www.rationalistinternational.net/Shaiikh/fir_dr_shaikh.htm.

¹⁸⁸ PAKISTAN CONST., art. 1.

¹⁸⁹ *Id.* art. 2.

¹⁹⁰ *Id.* art. 227.

¹⁹¹ *Id.* art. 20:

20. Subject to law, public order and morality:

the minorities freely to profess and practice their religions,”¹⁹³ the government “imposes [strict statutory] limits on freedom of [speech and] religion.”¹⁹⁴ The Pakistan government’s primary stated goal is to preserve the “*glory of Islam*,” a goal which even trumps rights such as the freedom of speech.¹⁹⁵

This clear bias for Islam has prompted Muslim citizens to report more blasphemy cases, which has in turn resulted in increased convictions and sentencing for blasphemy. In the decade following Zia’s amendments to the Penal Code, the number of blasphemy cases tripled.¹⁹⁶ Between 1986 and 2006, more than 800 people were charged in 375 cases of blasphemy,¹⁹⁷ and in 2000 alone, over 50 Christians were arrested and charged with blasphemy.¹⁹⁸ As the Lahore High Court noted,

ever since the law became more stringent, there has been an increase in the number of *registration* of blasphemy cases . . . between 1948 and 1979, 11 cases of blasphemy were registered. Three cases were reported between the period 1979 and 1986. Forty four cases were registered between 1987 and 1999. In 2000, fifty two cases were registered . . . this shows that the *law was being abused* . . . to settle . . . scores.¹⁹⁹

For example, in 2007, a Muslim brought accusations of blasphemy and Qur’an-burning against Walter Khan, a seventy-nine-year-old Christian, simply because Walter refused to sell his house for a lower price.²⁰⁰ Because of the presumption in favor of Islam, the police responded to the baseless accusation and arrested Walter.²⁰¹

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- (a) every citizen shall have the right to profess, practise and propagate his religion; and
 - (b) every religious denomination and every sect thereof shall have the right to establish, maintain and manage its religious institutions.

Id.

¹⁹² *Id.* art. 19.

19. Freedom of speech, etc.:

Every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, [commission of] or incitement to an offence.

Id.

¹⁹³ *Id.* pmb1.

¹⁹⁴ U.S. DEP’T OF STATE, INT’L RELIGIOUS FREEDOM REPORT 2008 PAKISTAN (2008) [hereinafter RELIGIOUS FREEDOM REPORT 2008], available at <http://www.state.gov/g/drl/rls/irf/2008/108505.htm>.

¹⁹⁵ PAKISTAN CONST., art. 19 (emphasis added).

¹⁹⁶ *Siddique*, *supra* note 176, at 324.

¹⁹⁷ NATIONAL COMMISSION FOR JUSTICE AND PEACE, HUMAN RIGHTS MONITOR 2007: A REPORT ON RELIGIOUS MINORITIES IN PAKISTAN (2007), available at <http://asiarecipe.com/pakhumanrights.html>.

¹⁹⁸ Akbar S. Ahmed, *Pakistan’s Blasphemy Law: Words Fail Me*, WASH. POST, May 19, 2002, at B1, available at <http://www.washingtonpost.com/ac2/wp-dyn/A36108-2002May17>.

¹⁹⁹ *Muhammad Mahboob v. State*, (2002) 54 PLD (SC) 587, ¶ 16 (Pak.) (emphasis added).

²⁰⁰ Ali Waqar, *Walter Fazal Khan jailed for allegedly burning Quran*, DAILY TIMES, May 14, 2007, at 13, available at http://www.dailytimes.com.pk/default.asp?page=2007%5C05%5C14%5Cstory_14-5-2007_pg13_1.

²⁰¹ *Id.*

These abusive reports set the judicial process in motion, often resulting in the arrest and conviction of defendants for ambiguous and objectively innocent comments. For example, in *Kumar v. State*, an appeals case discussing the appointment of bail, Kumar, a doctor, was arrested under section 295-C because one of his co-workers thought that he had blasphemed Muhammad by referring to a fellow doctor as a “messenger.”²⁰² Although the appeals court held that Kumar should be allowed bail, the allegation and arrest were subjectively based upon the complainant’s perspective. There was *no objective* application of any standards of blasphemy; Kumar was arrested because his friend was essentially offended on Muhammad’s behalf. Section 295-C allowed a friend’s overly-developed religious zeal to instantly transform Kumar’s passing observation, that someone who brings a message is a messenger, into a criminal offence. This statutory ambiguity has clearly prejudiced Pakistan’s judicial system.

In 2001, a professor was arrested and sentenced to death under section 295-C for responding to a student’s question in class and making factual statements about Muhammad.²⁰³ Dr. Shaikh was a family doctor and professor in a medical school in Islamabad, Pakistan. During his class, he addressed a student’s question by discussing Arab cultural practices before the birth of Islam.²⁰⁴ According to the police report filed against him, Dr. Shaikh “blasphemed” by saying that Muhammad was not a Muslim until he was forty years old, that he had not shaved his armpit hair or been circumcised until he became a Muslim, that he had married before he was a Muslim, and that his parents were non-Muslim.²⁰⁵ These statements, though objectively neutral historical facts, resulted in Dr. Shaikh’s conviction.²⁰⁶ Although Shaikh was eventually acquitted two years later,²⁰⁷ section 295-C’s broad language resulted in his conviction because it prevented him from simply explaining that his statements were hypothetical responses to his student’s question.²⁰⁸

E. Pakistan’s Current Blasphemy Laws Have Not Only Failed To Prevent Incitement to Religious Hatred, They Have Incited the Muslim Population to Religious Hatred, Which Has In Turn Increased Public Disorder and Disgraced Islam, Contrary to the Fundamental Purpose of the Blasphemy Laws.

Since Zia’s amendments, the resulting increase in blasphemy cases and the broadened scope of “incitement to religious hatred,” which has prompted the ambiguous and inconsistent enforcement of blasphemy laws, have had noticeable side effects. The provisions have created societal turmoil and unrest as angry mobs, radical Islamic groups, and even police officers engage in extra-judicial violence to squelch all non-Muslim sentiment. As Pakistani authorities provide less and less protection for those charged under these laws, Pakistan’s predominantly Muslim society has adopted and violently implemented their own “zero-tolerance” policy against

²⁰² *Kumar v. State*, 2010 MLD (Karachi) 253 (Pak.).

²⁰³ *Siddique*, supra note 176, at 343.

²⁰⁴ *Id.*

²⁰⁵ First Information Report (FIR), Police Station: Margela, Islamabad, Case of Dr. Younus Shaikh (2000), available at http://www.rationalistinternational.net/Shaiikh/fir_dr_shaikh.htm.

²⁰⁶ *Siddique*, supra note 176, at 343.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 344; see also *State v. Muhammad Arshad Javed*, (1995) 13 MLD (SC) 667 (Pak.).

blasphemers. Radical Muslim groups harass alleged blasphemers, mobbing their houses or killing them after they are vindicated and released.²⁰⁹ Between 1986 and 2009, angry Muslims killed more than thirty people because of blasphemy allegations.²¹⁰ Even the mere accusation of blasphemy forces entire families into hiding,²¹¹ leaving their houses and personal property to be looted by their Muslim neighbors.²¹²

Just recently, in July 2010, two brothers, Sajid and Rashid Emmanuel, were shot just days after evidence was delivered exonerating them from blasphemy charges.²¹³ The brothers had been charged with hand writing and distributing pamphlets containing blasphemous statements.²¹⁴ The court sent their hand-writing to be analyzed against the pamphlets, but unidentified Muslim assailants shot the brothers as they were being led back to jail in police custody.²¹⁵

In August 2009, in a shockingly violent response to baseless rumors that Christians had desecrated the Qur'an, Muslim rioters burned and looted over 100 Christian homes in Gojra, killed six Christians, and wounded twenty more.²¹⁶ Officials later confirmed that the rumors that Christians had desecrated the Qur'an were false, but the angry Muslim mob had already made its point and dispersed.²¹⁷ Blasphemy allegations had a similar effect in 2008 when a local mosque broadcast the false charge that Gulsher Masih had encouraged his daughter to rip pages out of the Qur'an.²¹⁸ In response, an angry mob stormed his house with sticks, bottles of kerosene, and rocks, forcing the police to take Gulsher and his family into custody.²¹⁹ When the mob continued to demand that Gulsher and his daughter be hanged, the police charged Gulsher with blasphemy.²²⁰

In more serious cases, mobs have simply murdered non-Muslims because of unfounded

²⁰⁹ See, e.g., AMNESTY INT'L, AMNESTY INTERNATIONAL REPORT 2004 – PAKISTAN (2004), <http://www.unhcr.org/refworld/docid/40b5a1fe0.html> (reporting that Mushtaq Zafar was killed by unknown assailants).

²¹⁰ Emmanuel Y. Mani, *Blasphemy laws and religious discrimination, an attack on Pakistan's future*, ASIA NEWS, Nov. 10, 2009, <http://www.asianews.it/news-en/Blasphemy-laws-and-religious-discrimination,-an-attack-on-Pakistan%E2%80%99s-future-16823.html>.

²¹¹ E.g., RELIGIOUS FREEDOM REPORT 2008, *supra* note 194. "Mobs [attack] individuals accused of blasphemy, their family, or their religious community prior to their arrest . . . [A]ccused persons often went into hiding or emigrated after acquittal." *Id.*

²¹² See, e.g., *Pakistan: 'Blasphemy' Cases Send Christians into Hiding*, COMPASS DIRECT NEWS, Nov. 13, 2008, <http://www.onenewsnow.com/Persecution/Default.aspx?id=319020>. "[Out of] jealousy [Muslims] want to throw [blasphemers] out of the villages." *Id.* (internal quotations omitted).

²¹³ Christians Accused of 'Blasphemy' Slain in Pakistan, COMPASS DIRECT NEWS, July 19, 2010, <http://www.compassdirect.org/english/country/pakistan/22927/>.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ Ani, *Gojra riots highlights insecurity of Pak Christian minority*, THAIANDIAN NEWS, Aug. 3, 2009, http://www.thaindian.com/newsportal/world-news/gojra-riots-highlights-insecurity-of-pak-christian-minority_100226724.html.

²¹⁷ *Id.*

²¹⁸ *Pakistan: 'Blasphemy' Cases Send Christians into Hiding*, *supra* note 212.

²¹⁹ *Id.*

²²⁰ *Id.*

allegations of blasphemy. For example, Jagdeesh Kumar, a Hindu, was beaten to death by his Muslim co-workers after they heard that he allegedly made blasphemous remarks about Muhammad.²²¹ In 2002, a fellow prisoner killed another blasphemy convict, Yousuf Ali, inside the prison.²²² Others, like Niamat Ahmer and Tahir Iqbal, were killed “even before the courts could hear the cases registered against them.”²²³

In 1995, Manzoor Masih, who had been accused of blasphemy, was shot dead in front of the Lahore Court before several eye witnesses.²²⁴ Later that same year, one of the retired judges in the case, “Arif Iqbal Bhatti[,] was shot dead by unidentified members of religious groups. His death was believed to be linked to his role in the acquittal . . . of Salamat Masih and Rehmat Masih who had been sentenced to death for blasphemy [as co-defendants with Manzoor Masih].”²²⁵ Judge Iqbal’s murder was not isolated—defence lawyers and presiding judges in blasphemy cases are often harassed and placed in danger.²²⁶ Muslim extremists, led by Islamic clerics, often “crowd into the courtroom, shouting blood-curdling threats to the judge and defense counsel.”²²⁷

Threats of mob violence often drive accused blasphemers into hiding, sometimes requiring police intervention. In 2008, the police were “forced” to incarcerate Dr. Robin Sardar on charges of blasphemy after a mob stormed his house with sticks and weapons, requiring the police to use a ladder to remove Sardar safely to prison.²²⁸ Sardar’s wife was driven into hiding, fearing for her life, and local Muslims threatened to kill Sardar if he were acquitted.²²⁹ Later in 2008, the charges against Sardar were found to be meritless, though he was understandably fearful to return to his former neighborhood.²³⁰ A year earlier, when another Christian was accused of blasphemy, his family was also forced into hiding, fearing that the blasphemy charges

²²¹ Sheraz Khurram Khan, *Pakistani Hindu killed over blasphemy accusation*, ASSIST NEWS SERV., Apr. 9, 2008, <http://www.assistnews.net/Stories/2008/s08040060.htm>.

²²² Paul Watson, *A Deadly Place for Blasphemy*, L.A. TIMES, Aug. 5, 2002, available at <http://www.thepersecution.org/news/lat020805.html>.

²²³ United Nations, Econ. & Soc. Council, Civil and Political Rights, Including the Question of Religious Intolerance, Statement Submitted by Franciscans International, Comm’n of the Churches on Int’l Affairs of the World Council of Churches, and the World Alliance of Reformed Churches, U.N. Doc. E/CN.4/1999/NGO/31 (1999), ¶ 7, available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/9da54d3f22f184f1802567390039e0d6?Opendocument>.

²²⁴ AMNESTY INT’L, *PAKISTAN: Use and abuse of the blasphemy laws* (1994), <http://asiapacific.amnesty.org/library/Index/ENGASA330081994?open&of=ENG-390>.

²²⁵ AMNESTY INT’L, HUMAN RIGHTS IN PAKISTAN (1998), available at <http://www.amnestyusa.org/annualreport.php?id=ar&yr=1998&c=PAK>.

²²⁶ See AMNESTY INT’L, *supra* note 224 (reporting death threats against lawyers representing people in blasphemy cases).

²²⁷ Benedict Rogers, *Pakistan Descends into “Confusion and Madness” as Islamic Extremist Grip Tightens*, THE CUTTING EDGE, Aug. 25, 2008, <http://www.thecuttingedgenews.com/index.php?article=714&pageid=13&page name=Analysis>.

²²⁸ *Pakistan: Pakistani doctor jailed on ‘blasphemy’ charges*, COMPASS DIRECT NEWS, May 16, 2008, <http://www.onenewsnow.com/Persecution/Default.aspx?id=118696>.

²²⁹ *Id.*

²³⁰ *Id.*

would be imputed to them and put them in danger.²³¹

In some instances, the police themselves have used terrorizing tactics against blasphemers. In 2009, when Hector Aleem was accused of sending a blasphemous text message, the police raided his home, assaulted his wife and family, stole over 600 hundred dollars of Aleem's property, and deprived Aleem of food and medication during his incarceration.²³² Although Aleem was eventually acquitted, numerous protestors gathered at his acquittal hearing to call for his death, and his family remains in hiding out of fear for their safety.²³³ Even more appalling, a police officer who was appointed to protect Samuel Masih, a young Christian, claimed he was fulfilling his religious duty when he used a hammer to beat Masih to death while Masih was in the hospital.²³⁴ The officer proclaimed that he was "spiritually satisfied" with killing Masih, who he considered an infidel worthy of death.²³⁵ Many defendants have voluntarily remained in prison instead of posting bail due to the extreme danger they would face both from the authorities and society.²³⁶

These deplorable cases of community and police violence against putative blasphemers underscore the failure of Pakistan's blasphemy laws to preserve even a semblance of proper public order. Instead, the laws punishing incitement to religious hatred have *created* such incitement. The prevalence of mob violence, the repetitive murders during trial, and the threats against life and property establish that Pakistan's blasphemy laws have only succeeded in creating and strengthening a violent, radical, and uncontrollable society that already had deep-seated convictions against blasphemers.

Moreover, the abuse of the judicial process and the extra-judicial violence against non-Muslims does not serve Pakistan's stated constitutional purpose. Although Pakistan is supposedly committed to preserving the "*glory of Islam*,"²³⁷ there is nothing glorious about mob violence, increased numbers of false blasphemy allegations, and convictions for non-malicious comments.

F. Conclusion

Pakistan's blasphemy laws have failed to prevent religious hatred that constitutes incitement to discrimination or violence. Court decisions enforcing the original Penal Code effectively and specifically targeted only malicious outrage against individual religious sentiment. But after General Zia's amendments, the current Penal Code severely punishes expressions in whatever form they may be "perceived" as blasphemy by a Muslim. As a result

²³¹ Qaiser Felix, *Accused of blasphemy, an 11-year-old boy risks the death penalty*, ASIA NEWS, Apr. 4, 2007, <http://www.asianews.it/index.php?l=en&art=8916&size=A#>.

²³² *Pakistan: Christian Charged with 'Blasphemy' for Text Message*, COMPASS DIRECT NEWS, Feb. 5, 2009, <http://www.compassdirect.org/english/country/pakistan/1993/>.

²³³ *Id.*

²³⁴ *Christian beaten to death in hospital by Muslim cop*, WORLD NET DAILY, May 30, 2004, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=38716.

²³⁵ *Id.*

²³⁶ RELIGIOUS FREEDOM REPORT 2008, *supra* note 194.

²³⁷ PAKISTAN CONST., art. 19 (emphasis added).

of these broadly prejudicial provisions, Pakistani Muslims have used the laws as a pretense to express their anger and frustration against non-Muslims. Public disorder has increased as Muslims have mobbed the houses of alleged blasphemers, shot defendants during trial, and threatened defendants' lives and families. Far from reducing incitement that constitutes religious hatred, discrimination, and violence, Pakistan's blasphemy laws have exponentially increased such incitement and religious hatred.

INDIA

A. Introduction

The ICCPR protects the right to freedom of expression, which includes the "freedom to seek, receive and impart information and ideas of all kinds."²³⁸ Because this right is not absolute, article 20 of the ICCPR provides that "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."²³⁹ Instead of using this exception to protect its citizens, however, India has enacted laws that are based on racial and religious biases, which have provoked violence and discrimination against its religious minorities.

Seven out of twenty-eight states in India have passed anti-conversion laws entitled Freedom of Religion Acts,²⁴⁰ which violate a person's freedom to choose a religion and violate freedom of religious expression by prohibiting people from sharing their faith with others. These overbroad laws have in turn incited religious and racial hatred. They have become the legal venue for the power struggle driven by India's Hindu caste system, violently suppressing minority religions and the powerless members of the lowest caste by eliminating all prospects of upward mobility.²⁴¹

²³⁸ ICCPR, *supra* note 5.

²³⁹ *Id.* art. 20(2).

²⁴⁰ Arunachal Pradesh Freedom of Religion Act (No. 4 of 1978) (India), *available at* http://indianchristians.in/news/images/resources/pdf/arunachal_pradesh_freedom_of_religion_act-text_only.pdf; Chhattisgarh Freedom of Religion (Amendment) Act (No. 18 of 2006) (India), *available at* http://indianchristians.in/news/images/resources/pdf/chhattisgarh_freedom_of_religion_act_amendment-text_only.pdf; Gujarat Freedom of Religion Act (No. 24 of 2003) (India), *available at* http://indianchristians.in/news/images/resources/pdf/Gujarat_Freedom_of_Religion_Act.pdf (Gujarat's Freedom of Religion Rules refer to this act as No. 22 of 2003 and the discrepancy is not explained); Gujarat Freedom of Religion Rules, 2008 (India), *available at* http://indianchristians.in/news/images/resources/pdf/Gujarat_Freedom_of_Religion_Rules.pdf; Himachal Pradesh Freedom of Religion Bill (No. 31 of 2006) (India), *available at* http://indianchristians.in/news/images/resources/pdf/Himachal_Pradesh_Freedom_of_Religion_Act.pdf; Madhya Pradesh Freedom of Religion Act (No. 27 of 1968) (India), *available at* http://indianchristians.in/news/images/resources/pdf/madhya_pradesh_freedom_of_religion_act_amendment-text_only.pdf; Orissa Freedom of Religion Act (No. 2 of 1968) (India), *available at* http://indianchristians.in/news/images/resources/pdf/orissa_freedom_of_religion_act-text_only.pdf; Rajasthan Freedom of Religion Bill (No. 12 of 2006), *available at* http://indianchristians.in/news/images/resources/pdf/rajasthan_freedom_of_religion_bill-text_only.pdf.

²⁴¹ *Untouchables Caste off Creed for Better Deal*, THE AUSTRALIAN, Oct. 16, 2006, *available at* <http://www.theaustralian.com.au/news/world/untouchables-caste-off-creed-for-better-deal/story-e6frg6so-111112366304>.

B. India's Anti-Conversion Laws Stifle Freedom of Expression and Freedom of Religion by Prohibiting Even Non-Coercive Proselytizing.

India's anti-conversion laws stifle the freedom to practice religion by prohibiting the expression of even fundamental aspects of non-Hindu belief systems. Anti-conversion laws are active in five of twenty-eight states in India: Orissa, Chhattisgarh, Madhya Pradesh, Gujarat, and Himachal Pradesh.²⁴² Two other states have passed similar laws, though they remain inactive due to lack of enforcement.²⁴³ Although anti-conversion laws of various states contain individual nuances, all forbid any conversion from one religion to another by "forcible" or "fraudulent" means or by "allurement" or "inducement."²⁴⁴ Each state's anti-conversion law includes within its definition of "force" any "threat of injury" or even a "threat of divine displeasure or social excommunication."²⁴⁵ Each state's definition of "inducement" or "allurement" includes "any gift or gratification."²⁴⁶

In 1977, the Supreme Court of India affirmed the constitutionality of these anti-conversion statutes, arguing that there was "no fundamental right to convert another person to one's own religion," because all purposeful proselytizing "impinge[s] on the 'freedom of conscience' guaranteed to all the citizens of the country alike."²⁴⁷ The Supreme Court came to this bizarre conclusion when resolving contradictory state rulings on anti-conversion laws from the High Courts of Orissa and Madhya Pradesh.²⁴⁸

This ruling has paved the way for other states to enact similar anti-conversion provisions, which only pretend to protect all religious adherents from coercive proselytizing. In reality, these

²⁴² See *supra* note 240; see also BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, INDIA: INTERNATIONAL RELIGIOUS FREEDOM REPORT (2009), available at <http://www.state.gov/g/drl/rls/irf/2009/127365.htm>.

²⁴³ Arunachal Pradesh and Rajasthan have both passed anti-conversion legislation. However, Arunachal Pradesh has an inactive anti-conversion law due to its lack of specified regulations needed for enforcement. *Id.* The Governor of Rajasthan has refused to sign its anti-conversion act into law. *Id.*

²⁴⁴ See e.g., Madhya Pradesh Freedom of Religion Act, § 3 (No. 27 of 1968) (India), available at http://indianchristians.in/news/images/resources/pdf/madhya_pradesh_freedom_of_religion_act_amendment-text_only.pdf.

²⁴⁵ See *supra* note 240.

²⁴⁶ See e.g., Gujarat Freedom of Religion Act (no. 24 of 2003) (India), available at http://indianchristians.in/news/images/resources/pdf/Gujarat_Freedom_of_Religion_Act.pdf; Himachal Pradesh Freedom of Religion Bill (No. 31 of 2006) (India), available at http://indianchristians.in/news/images/resources/pdf/Himachal_Pradesh_Freedom_of_Religion_Act.pdf.

²⁴⁷ *Rev. Stainislaus v. Madhya Pradesh* (1977) 2 S.C.R. 611 (India).

²⁴⁸ In 1968, Madhya Pradesh made it a crime to "convert or attempt to convert, either directly or otherwise, any person from one religious faith to another by the *use of force* or by *allurement* or by any *fraudulent means* nor shall any person *abet* any such conversion." Madhya Pradesh Freedom of Religion Act, § 3 (No. 27 of 1968) (India), available at http://indianchristians.in/news/images/resources/pdf/madhya_pradesh_freedom_of_religion_act_amendment-text_only.pdf (emphasis added). The Madhya Pradesh high court validated this Act, arguing that its broad scope was necessary to prevent a person from exercising his religious freedom and using "questionable methods" to encroach upon his neighbor's religious freedoms. *Rev. Stainislaus v. Madhya Pradesh*, 1975 A.I.R. 163 (Prad.). Orissa passed a similar act in 1968, but the Orissa high court ruled directly opposite to the Madhya Pradesh high court and invalidated Orissa's Act because the legislature lacked authority to make a law relating to religion. *Mrs. Yulitha Hyde v. Orissa*, 1973 A.I.R. 116 (Ori.) ¶¶ 10, 12, available at <http://www.indiankanoon.org/doc/453517/>.

provisions give the government unchecked authority to keep believers from publically expressing their faith and non-believers from receiving that expression, even though articles 18 and 19 of the ICCPR specifically protect all such non-coercive interaction between believers and non-believers. Article 18 ensures the right to “adopt a religion or belief of [one’s] choice and . . . to *manifest* his religion . . . in . . . practice and teaching.”²⁴⁹ Similarly, article 19 guarantees the freedom to “seek, receive *and* impart information and ideas of all kinds.”²⁵⁰ By including the language “seek, receive, and impart information and ideas,” the ICCPR protects both the speaker and his audience and promotes a forum for freedom of expression. India’s passage of broad anti-conversion laws defeats these protections and destroys any forum for freedom of expression.

Because India’s laws have broadened the term “force” to include even “a threat of divine displeasure,”²⁵¹ believers whose religious tenets require them to admonish non-believers to escape impending divine judgment are severely restricted in the practice of their faith. For example, Christians believe that unless non-believers turn to Christ, they will be judged and punished by God for their sins.²⁵² One of the primary themes of the Bible is the theme of disobedience and divine punishment.²⁵³ Similarly, the Qur’an contrasts the joys of paradise promised to Muslim believers and the miseries of hell awaiting the infidel.²⁵⁴ But, despite being foundational tenets of Christianity and Islam, these beliefs would easily be considered threats of divine displeasure under India’s anti-conversion laws. A Christian expressing these ideas to a friend faces the threat of prosecution for “forcible conversion.” Religious minorities in India live in fear of either failing to obey the commands of their faith or being subject to discrimination and prosecution under the anti-conversion laws.

Moreover, because India’s laws define “allurement” and “inducement” to include “the offer of any gift or gratification, either in cash or in kind . . . [or] the grant of any benefit,”²⁵⁵ religious charitable organizations are susceptible to false accusations, because their work might be interpreted as an allurement or inducement to convert.²⁵⁶ For example, in October 2005, the police arrested Sunny John in Indore, Madhya Pradesh, on the allegation that he was forcibly converting children through his charitable work at three children’s schools.²⁵⁷ John ran the schools and homes to provide food and education for children of low-income families.²⁵⁸

²⁴⁹ ICCPR, *supra* note 238, art. 18(1) (emphasis added).

²⁵⁰ *Id.* art. 19(2) (emphasis added).

²⁵¹ See e.g., Orissa Freedom of Religion Act, § 2(b) (No. 2 of 1968) (India), *available at* http://indianchristians.in/news/images/resources/pdf/orissa_freedom_of_religion_act-text_only.pdf.

²⁵² See e.g., *John* 3:16; *Romans* 3:23, 6:23, 5:8, 10:9–13; *Hebrews* 10:30; *Luke* 13:27–28.

²⁵³ See e.g., *Leviticus* 26.

²⁵⁴ See ‘ABDULLAH YUSUF ‘ALI, THE MEANING OF THE HOLY QUR’AN, Surah 16:61 (10th ed. reprinted 2003).

²⁵⁵ See e.g., Orissa Freedom of Religion Act, § 2(d) (No. 2 of 1968) (India), *available at* http://indianchristians.in/news/images/resources/pdf/orissa_freedom_of_religion_act-text_only.pdf; Gujarat Freedom of Religion Act, § 2(a) (No. 24 of 2003) (India), *available at* http://indianchristians.in/news/images/resources/pdf/Gujarat_Freedom_of_Religion_Act.pdf.

²⁵⁶ *India’s Anti-Conversion Laws Loaded in Favor of Majority Hindu Religion*, ALL INDIA CHRISTIAN COUNCIL, Jan. 16, 2007, <http://indianchristians.in/news/content/view/896/43/>.

²⁵⁷ Vishal Arora, *Christian Arrested under Anti-Conversion Law in India*, WORTHY CHRISTIAN NEWS, Oct. 13, 2005, <http://www.worthynews.com/273-christian-arrested-under-anti-conversion-law-in-india>.

²⁵⁸ *Id.*

Although none of the children complained of attempts to convert them, police arrested John after Hindu extremists surrounded the police station and demanded he be arrested for forcible conversions.²⁵⁹ Similarly, in February 2006, the religious charitable organization, Emmanuel Ministries International (“EMI”), was falsely accused of making forcible conversions in Rajasthan.²⁶⁰ The government of Rajasthan froze EMI’s bank accounts and proceeded to revoke licenses held by EMI-owned charities, including an orphanage, hospital, school, and a Bible institute.²⁶¹ The authorities imprisoned EMI’s president, Samuel Thomas, for a month and half for allegedly “hurting the religious sentiments of Hindus.”²⁶² The Supreme Court later granted Thomas bail, but restricted his ability to travel.²⁶³

C. India’s Anti-Conversion Laws Incite Religious Hatred, Resulting in Discrimination, Hostility, and Violence.

One of the effects of India’s anti-conversion laws has been to fuel hatred of those beneath the caste system, resulting in perpetual discrimination, oppression, and abuse of the lowest caste and “untouchables.”²⁶⁴ The caste system was developed by Indo-Aryans who conquered India and wanted “to preserve their racial purity in India.”²⁶⁵ Ultimately, lighter-skinned Indo-Aryans constituted the upper castes, while the darkest skinned, the Dravidians, were considered outside the caste system altogether and became known as the “untouchables.”²⁶⁶ This caste system, based on the Hindu concept of Varna (literally, “color”), is now a deeply rooted part of the culture in India.²⁶⁷ Because of the resulting discrimination, oppression, and violence, masses of “untouchables” are converting to non-Hindu religions to escape their stigmatized status.²⁶⁸ Although a majority of states have introduced or strengthened their anti-conversion laws with the stated purpose of “protecting” the vulnerable Dalits from “improper” pressure to convert, critics across the board believe that the anti-conversion laws are designed to keep the “untouchables” just that—untouchable.²⁶⁹

These issues have not gone unnoticed on the international stage. In the 2008 Report of the Special Rapporteur on freedom of religion or belief, the Special Rapporteur stated that

²⁵⁹ *Id.*

²⁶⁰ BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEPARTMENT OF STATE, INDIA: INTERNATIONAL RELIGIOUS FREEDOM REPORT § II (2008), available at <http://www.state.gov/g/drl/rls/irf/2008/108500.htm>.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ Rubayat Ahsan, *Anti Conversion Law: To Stop Dalits Escaping From the Prison of Caste System*, DEVRIGHTS Apr. 1, 2008, <http://developmenthumanrights.wordpress.com/2008/04/01/anti-conversion-law-to-stop-dalits-escaping-from-the-prison-of-caste-system/>.

²⁶⁵ *Racism, Nationalism, Tribalism and the Cast System: What They’ve Done to the World in the Last 100 Years*, SOUNDVISION.COM, <http://www.soundvision.com/info/racism/statistics.asp> (last visited Sept. 27, 2010).

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ Laura Dudley Jenkins, *Legal Limits on Religious Conversion in India*, 71 LAW & CONTEMP. PROB. 109, 123 (2008).

²⁶⁹ See, e.g., Manpreet Singh, *India: Despised Dalits Quit Hinduism, Find New Dignity in Christ*, CHRISTIANITY TODAY, Dec. 9, 2002, available at <http://www.christianitytoday.com/ct/2002/december9/15.22.html?start=1>; Ahsan, *supra* note 264.

[Laws on religious conversion] or even draft legislation have had adverse consequences for religious minorities and have reportedly fostered mob violence against them. There is a risk that “Freedom of Religion Acts” may become a tool in the hands of those who wish to use religion for vested interests or to persecute individuals on the ground of their religion or belief. While persecution, violence or discrimination based on religion or belief need to be sanctioned by law, the Special Rapporteur would like to caution against excessive or vague legislation on religious issues which could create tensions and problems instead of solving them.²⁷⁰

Ultimately, “[r]eligiously-motivated violence against religious minorities in India is often justified with accusations that the victims were attempting to convert others, and it is not uncommon that such attacks receive the complicity of police while the perpetrators enjoy impunity.”²⁷¹

Another effect of India’s anti-conversion laws has been an increase in government and community violence against religious minorities. Because the courts have so broadly interpreted and upheld anti-conversion laws, Hindus have used the laws as an excuse to zealously persecute non-Hindus out of sheer religious and racial hatred. For example, in August 2010 alone, there have been at least five instances of false accusations against non-Hindus, many of them accompanied by severe beatings.²⁷² On 29 August 2010, Hindu extremists falsely accused a local Christian pastor of forcibly converting two Hindus to Christianity by offering them money and “false hope.”²⁷³ Just before the complaint was filed, the Hindu extremists attacked the pastor and the two converts and fractured the two converts’ hands and legs.²⁷⁴ Instead of charging the assaulters, the police charged the three Christian men with violating section 295(a) of the Indian Penal Code by committing “deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion.”²⁷⁵ The men were sent to jail the same day.²⁷⁶

²⁷⁰ Special Rapporteur on Freedom of Religion or Belief, *Promotion & Protection of All Human Rights, Civil, Political, Economic, Social & Cultural Rights, Including the Right to Development—Report of the Special Rapporteur on Freedom of Religion or Belief*, ¶ 50, U.N. Doc. A/HRC/10/8/Add.3 (Jan. 26, 2009) (by Asma Jahangir), available at <http://documents.un.org/advance.asp> (type “A/HRC/10/8/ADD.3” into “Symbol” field; follow first search result; follow “English(106.3K)” link).

²⁷¹ Executive Summary, *India: Communalism, Anti-Christian Violence and the Law*, at 12, CHRISTIAN SOLIDARITY WORLDWIDE, May 2010, available at <http://dynamic.csw.org.uk/article.asp?t=report&id=126> (click “download full briefing” following text description).

²⁷² See also *Briefs: Recent Incidents of Persecution*, COMPASS DIRECT NEWS, Aug. 31, 2010, <http://www.compassdirect.org/english/country/india/24929/>. In Madhya Pradesh, on August 16, 2010, police filed charges against a local pastor under the state’s anti-conversion law accusing him of forcibly converting others. The charges were filed after about thirty-five Hindu extremists stormed a church meeting shouting, slapped the pastor, and falsely accused him of forcibly converting villagers. One day earlier, two Hindu extremists falsely accused a Christian convert of building his house for conversion purposes and threatened that if he did not stop building, they would destroy his belongings. He reported the matter to police, who offered him security. *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

A week earlier, armed extremists in New Delhi stopped a pastor on his way to a church meeting, took him to an extremist gathering, and beat him for allegedly forcing people to convert.²⁷⁷ In that same week, Hindu nationalists interrupted a prayer meeting, tore up literature, dragged the pastor to the village council, and falsely accused him of forcibly converting Hindus by offering them bribes.²⁷⁸ Although the extremists were unable to substantiate their claim, the police forced the pastor to sign a statement indicating he would not forcibly convert people in the village.²⁷⁹

Far from being anomalous, this recent rash of accusations is part of a continuing trend. On 8 February 2007, Hindu extremists beat an evangelist from the Friends of the Missionary Prayer band.²⁸⁰ They falsely accused him of converting people and forced him into a police station where the police filed a complaint against him under Chhattisgarh's anti-conversion law and incarcerated him.²⁸¹ No complaint was filed against the extremists who attacked him.²⁸² Similarly, in March 2006, police in Madhya Pradesh detained a Christian couple for "illegal conversion" after over a dozen Hindus ransacked their home, destroying their personal property and ripping up their Bibles.²⁸³

D. Conclusion

By broadly proscribing all non-coercive proselytizing, India's anti-conversion laws have restricted its citizens' freedom of expression and freedom of religion guaranteed by articles 18 and 19 of the ICCPR. Moreover, the anti-conversion laws have led to increased violence towards religious minorities and have incited many in India's primarily Hindu population to religious hatred, which is prohibited by article 20 of the ICCPR. Despite India's avowed dedication to protecting the "'freedom of conscience' guaranteed to all citizens of the country alike,"²⁸⁴ the effect of its anti-conversion laws shows that India has missed that goal by a wide margin. In a futile and perhaps half-hearted attempt to balance the ICCPR's equal protection of the speaker's right to free expression and the individual's right to freedom of religion, India has opted for majority rule. By passing and enforcing anti-conversion laws, India has created a legal justification for Hinduism—the majority religion—to appropriate to itself all of the "religious freedoms" that were *originally* designed to protect the now-marginalized and persecuted religious minorities.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ Arora, *supra* note 257.

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *India Churches Condemn Anti-Conversion Law and Attack Against Missionaries*, BOSNEWSLIFE, Mar. 28, 2006, <http://www.bosnewslife.com/1950-1950-church-leaders-condemn-anti-conversion-law-an>.

²⁸⁴ *Rev. Stainislaus v. Madhya Pradesh* (1977) 2 S.C.R. 611 (India).

FREEDOM OF EXPRESSION IN AFRICA

Although each acceded to the ICCPR,²⁸⁵ neither Eritrea, Nigeria, nor Kenya has agreed to the First Optional Protocol of the ICCPR.²⁸⁶ These states, as well as other African states not discussed in this Report, possess a diverse religious population. Additionally, the cultural and political situations in the identified nations (Eritrea, Nigeria, and Kenya) are distinct, and thus each is discussed in turn.

ERITREA

A. Introduction

The Eritrean people's freedom of religious speech and expression is actively impeded by the Eritrean government. Since gaining official independence in 1993 (and after 30 years of war with Ethiopia) the Eritrean government has devolved into an increasingly oppressive totalitarian state under President Isaias Afewerki.²⁸⁷ In 1998, while the newly formed government was still in its infancy, the border dispute between Eritrea and Ethiopia once again became violent.²⁸⁸ The fighting ended in 2000, but despite international participation in settlement discussions²⁸⁹ the border remains disputed.²⁹⁰ The government of Eritrea has used this dispute to leverage its power, with control residing almost solely in the executive.²⁹¹ "[T]he government suspended implementation of a democratic constitution, canceled elections, curtailed press freedom, began a crackdown on political opponents, and restricted religious groups it perceived as undermining national unity."²⁹² Since 2001, Eritrea has remained "on a near-war footing" and has used the perceived "security threat" to control the "officially recognize[d]" religions and to oppress the adherents of minority religions.²⁹³

²⁸⁵ ICCPR, *supra* note 5.

²⁸⁶ Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter Optional Protocol], available at <http://www2.ohchr.org/english/law/ccpr-one.htm>.

²⁸⁷ Eritrea has a single "political" party, the People's Front for Democracy and Justice ("PFDJ"). CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK, ERITREA [hereinafter CIA WORLD FACTBOOK, ERITREA], <https://www.cia.gov/library/publications/the-world-factbook/geos/er.html#Govt> (last updated Sept. 9, 2010).

²⁸⁸ Jon Stephenson, *Eritrea and Ethiopia: Continual Conflict*, ICE CASE STUDIES, NO. 199 (Dec. 2006), <http://www1.american.edu/ted/ice/eritrea-ethiopia.htm#ah27>.

²⁸⁹ See Eritrea-Ethiopia Boundary Comm'n, Decision Regarding Delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia, Apr. 13, 2002, <http://www.un.org/NewLinks/eebcarbitration/EEBC-Decision.pdf>; S.C. Res. 1312, U.N. Doc. S/RES/1312 (July 31, 2000).

²⁹⁰ See *Eritrea-Ethiopia Border: In Detail*, THOMSON REUTERS, ALERTNET, Mar. 6, 2008, http://www.alertnet.org/db/crisisprofiles/EE_BOR.htm?v=links.

²⁹¹ CIA WORLD FACTBOOK, ERITREA, *supra* note 287.

²⁹² U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, ANNUAL REPORT 2010 48 (2010) [hereinafter 2010 USCIRF REPORT], available at <http://www.uscirf.gov/images/annual%20report%202010.pdf>.

²⁹³ *Id.*

Eritrea acceded to the ICCPR in 2002,²⁹⁴ but has not agreed to First Optional Protocol of the ICCPR.²⁹⁵ As with the Constitution, Eritrean citizens lack the ability to wield the ICCPR as a shield against governmental abuses. Without the Protocol, which confers jurisdiction upon the United Nations Human Rights Committee (“UNHRC”) to hear human rights complaints by individuals against a state party to the ICCPR, individual Eritrean citizens have no standing to seek redress from the UNHRC.²⁹⁶

B. Law Without Effect

The Eritrea National Assembly ratified the nation’s Constitution in 1997.²⁹⁷ The Constitution²⁹⁸ was set to enter into force upon completion of the first parliamentary and presidential elections in 2001.²⁹⁹ But President Afewerki and the People’s Front for Democracy and Justice (“PFDJ”) (the lone, ruling political party) suspended the elections purportedly in the interest of national security, and precluded the Constitution’s establishment as the rule of law.³⁰⁰ At the close of fighting with Ethiopia, there was “criticism of the leadership within the PFDJ. President Isaias [Afewerki] responded by arresting 11 senior government figures, who are still being detained without trial. At the same time the fledgling private press was closed down and nine journalists and numerous students detained. National elections were . . . delayed indefinitely.”³⁰¹ The 1997 Eritrean Constitution remains unenforced.³⁰² Consequently, the constitutional protections for freedom of religion and freedom of speech and expression have no legal force.

Although unenforced at this time, the provisions of the Constitution offer various protections. For example, article 14 of the Constitution, titled “Equality Under the Law,” provides that “[n]o person may be discriminated against on account of . . . religion . . . or any other improper factors.”³⁰³ Additionally, article 19, titled “Freedom of Conscience, Religion, Expression of Opinion, Movement, Assembly and Organisation,” provides that “[e]very person shall have the right to freedom of thought, conscience, and belief,” that “[e]very person shall have the freedom of speech and expression, including freedom of the press and other media,” and that “[e]very person shall have the freedom to practice any religion and to manifest such

²⁹⁴ U.N. Status of Treaties, *supra* note 138.

²⁹⁵ United Nations, Treaty Collection, Status of Treaties United Nations, Status of Ratification, Reservations, and Declarations to the Optional Protocol to the International Covenant on Civil and Political Rights [hereinafter Status of Optional Protocol], http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en (last visited Sept. 23, 2010).

²⁹⁶ *Id.* art. 1.

²⁹⁷ CIA WORLD FACTBOOK, ERITREA, *supra* note 287.

²⁹⁸ CONST. OF ERITREA.

²⁹⁹ CIA WORLD FACTBOOK, ERITREA, *supra* note 287.

³⁰⁰ *Id.*

³⁰¹ U.K. Foreign & Commonwealth Office, Country Information, Eritrea, Politics <http://www.fco.gov.uk/en/travel-and-living-abroad/travel-advice-by-country/country-profile/sub-saharan-africa/eritrea?profile=politics> (last updated Apr. 28, 2010).

³⁰² CIA WORLD FACTBOOK, ERITREA, *supra* note 287.

³⁰³ CONST. OF ERITREA art. 14. The Constitution does not define an “improper factor.”

practice.”³⁰⁴ But without implementation, Eritrean citizens are left without constitutional redress. Moreover, because the Constitution is not implemented, the Eritrea National Assembly has no power to enact laws. Therefore, the executive, President Aferwerki, has become a de-facto lawmaker.³⁰⁵

As noted by the Office of the United Nations High Commissioner for Refugees, at independence, Eritrea adopted the 1957 Penal Code of Ethiopia as its Transitional Penal Code.³⁰⁶ A copy of The 1957 Penal Code of Ethiopia is intended to provide somewhat adequate protections for religious freedom, but this Code has been superseded by Eritrea’s proclamations, as discussed *infra*.

Article 4 of the 1957 Penal Code of Ethiopia provides that the criminal law applies to all without discrimination based on religion.³⁰⁷ Additionally, article 281 states that it is a punishable offence to, “with intent to destroy” a religious group, engage in “(a) [k]illings, bodily harm or serious injury to the physical or mental health of member of the group, in any way whatsoever; or (b) measures to prevent the propagation or continued survival of its members or their progeny; or (c) the compulsory movement or dispersion of peoples or children, or their placing under living conditions calculated to result in their death or disappearance.”³⁰⁸ Article 771 requires punishment for public blasphemous or offensive remarks toward “the feelings or convictions of others or towards the Divine Being or the religious symbols, rites or religious personages.”³⁰⁹ Article 486 requires punishment for publicly disturbing authorised religious ceremonies or profaning places or objects used for religious ceremonies.³¹⁰ Article 282 prohibits forced religious conversion against the civilian population during a time of war.³¹¹ Article 408, governing authorised disclosures and those compelled at law, provides that religious confession is “at all times inviolable.”³¹² Article 480 states that “[w]hosoever . . . by whatever accusation or any other means foments dissension, arouses hatred, or stirs up acts of violence or political, racial or *religious* disturbances, is punishable.”³¹³ Article 563 prescribes special punishment for a child abductor who has the purpose of moving the child “to an environment foreign to his religious convictions or to his deepest feelings.”³¹⁴ However, any protection these statutes may provide appears only to extend, to the extent they are enforced, to the four recognized religious groups, as discussed *infra*. Additionally, reports suggest that the Eritrean judiciary is inefficient and inadequately funded and trained, and that its decisions are often influenced, if not directed,

³⁰⁴ *Id.* art. 19.

³⁰⁵ Library of Congress, Legal Research Guide: Eritrea, <http://www.loc.gov/law/help/eritrea.php> (last updated Aug. 30, 2010).

³⁰⁶ See UNHCR, Refworld, Penal Code of Ethiopia 1957, Proclamation No. 158 of 1957, 23 July 1957, *available at* <http://www.unhcr.org/refworld/docid/49216a0a2.html> (last visited Sept. 28 2010).

³⁰⁷ *Id.* art. 4,

³⁰⁸ *Id.* art. 281.

³⁰⁹ *Id.* art. 771.

³¹⁰ *Id.* art. 486.

³¹¹ *Id.* art. 282.

³¹² *Id.* art. 408.

³¹³ *Id.* art. 480.

³¹⁴ *Id.* art. 563.

by the Executive.³¹⁵

Proclamations issued after independence in 1991 by the Eritrean government and published in the Gazette of Eritrean Laws are equal in authority to the Transnational Civil and Penal Codes in the hierarchy of laws.³¹⁶ Several proclamations make clear that the Eritrean government is clamping down on religion and religious groups and limiting whatever protection they have in the codes. For example, Proclamation No. 73/1995 (1995), explains that religious groups that “interfere[] directly or indirectly with government politic through campaigns and mobilizations and create[] public unrest or cause hostility or offence among different religions or nationals, are legally liable.”³¹⁷ Additionally, “religions and religious institutions shall only undertake legal action corresponding to their spiritual nature;”³¹⁸ religious groups are prohibited from receiving foreign monetary contributions without government approval,³¹⁹ and religious groups may not engage in any political activity.³²⁰ All religious groups are heavily regulated and monitored by the “Department of Religious Affairs, within the Ministry of Internal Affairs.”³²¹ This proclamation imposes criminal penalties for its violation.³²² With regard to published speech, Proclamation No. 90/1996 (1996), prohibits newspapers from publishing and disseminating material that “vilifies or belittles . . . religious beliefs” or “incites religious . . . differences.”³²³

C. Suppression of Religious Speech and Expression

The oppression of religious minorities by the Eritrean government is significant. In 2002 the government mandated registration of religious groups.³²⁴ Since then, the Eritrean government “has not approved any registrations beyond the country’s four principal religious groups: the Eritrean Orthodox Church[,which is closely tied to the government], the Evangelical (Lutheran) Church of Eritrea, Islam, and the Roman Catholic Church.”³²⁵ Such limited approval effectively

³¹⁵ See U.S. DEP’T OF STATE, 2009 HUMAN RIGHTS REPORT: ERITREA [hereinafter 2009 HUMAN RIGHTS REPORT: ERITREA], available at <http://www.state.gov/g/drl/rls/hrrpt/2009/af/135952.htm>.

³¹⁶ Library of Congress, *supra* note 305.

³¹⁷ UNHCR, Refworld, Proclamation No. 73/1995, Proclamation to Legally Standardize and Articulate Religious Institutions and Activities, art. 3, cl. 3 (Eri. 1995), available at <http://www.unhcr.org/refworld/docid/48aec42b2.html>.

³¹⁸ *Id.* art. 8, cl. 1.

³¹⁹ *Id.* art. 7.

³²⁰ *Id.* art. 2, cl. 2.

³²¹ *Id.* arts. 2–9.

³²² *Id.* art. 11.

³²³ UNHCR, Refworld, Proclamation No. 90/1996, The Press Proclamation, Part V, 12 (Eri. 1996), available at <http://www.unhcr.org/refworld/country,,,LEGISLATION,ERI,456d621e2,48512e992,0.html>.

³²⁴ INST. ON RELIGION AND PUB. POL’Y, REPORT: RELIGIOUS FREEDOM IN ERITREA (2009), http://religionandpolicy.org/cms/index.php?option=com_content&task=view&id=2214&Itemid=304; U.S. DEP’T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2009, ERITREA [hereinafter 2009 INT’L RELIGIOUS FREEDOM REPORT, ERITREA], available at <http://www.state.gov/g/drl/rls/irf/2009/127231.htm>; Freedom House, *Freedom in the World 2010 – Eritrea* (2010), available at <http://www.unhcr.org/refworld/docid/4c0ceaf4c.html>.

³²⁵ 2009 INT’L RELIGIOUS FREEDOM REPORT, ERITREA, *supra* note 324. NGO Open Doors International reported in 2006 that at least twelve other religious groups had applied for registration. OPEN DOORS INT’L, ERITREA: FREEDOM

criminalizes religious activity that is unsanctioned by the Eritrean government:

By stipulating that there could be no public religious activities until registration has been approved by the government, the decree effectively closed places of worship and prohibited public religious activities, including worship services, of all unregistered religious communities. Although some groups submitted the required applications, none have been approved during the past eight years since the imposition of the requirement. As a result of the registration requirement and of the government's inaction on registration applications, all of Eritrea's religious communities, except the four government-sanctioned ones, lack a legal basis on which to practice their faiths publicly.³²⁶

Public religious activities encompass religious speech and expression. The most significantly affected groups are Protestant and Pentecostal Christian denominations, non-Sunni Muslims, Jehovah's Witnesses, and Baha'is.³²⁷ The Jehovah's Witnesses were essentially stripped of their civil rights³²⁸ shortly after Eritrean independence due to their religiously based refusal to vote in the referendum or to enter into military service.³²⁹ The refusal was viewed as "a sign of disloyalty"³³⁰ and "rejection of Eritrean citizenship."³³¹ As such, they were not even offered the opportunity to register as a religious group.³³²

The Eritrean government's denial of the "right to hold opinions"³³³ and the "freedom of expression"³³⁴ to minority religious groups is systematic and egregious. The government "continue[s] to disrupt private worship, conduct mass arrests of participants at religious weddings, prayer meetings, and other gatherings, and detain those arrested without charge for indefinite periods of time."³³⁵ Those arrested face torture and horrendous detention conditions in an attempt to force them to recant their faith.³³⁶

OF RELIGION AND BELIEF 6 (2006), available at http://www.opendoors.no/opendoors/vedlegg/eritrea%20-%20freedom%20of%20religion%20or%20belief%20-%20september%202006_16.01.2007_10.55.03.pdf.

³²⁶ 2010 USCIRF REPORT, *supra* note 292, at 48.

³²⁷ 2009 HUMAN RIGHTS REPORT: ERITREA, *supra* note 315; 2009 INT'L RELIGIOUS FREEDOM REPORT, ERITREA, *supra* note 324; 2010 USCIRF REPORT, *supra* note 292, at 48.

³²⁸ According to USCIRF, Jehovah's Witnesses cannot "obtain[] legal recognition of marriages and land purchases" or "government jobs, business licenses, and government-issued identity and travel documents." 2010 USCIRF REPORT, *supra* note 292, at 50.

³²⁹ Freedom House, *supra* note 324; 2010 USCIRF REPORT, *supra* note 292, at 50.

³³⁰ 2009 INT'L RELIGIOUS FREEDOM REPORT, ERITREA, *supra* note 324.

³³¹ 2010 USCIRF REPORT, *supra* note 292, at 50.

³³² *Id.* at 48.

³³³ ICCPR, *supra* note 5, art. 19(1).

³³⁴ *Id.* art. 19(2).

³³⁵ 2010 USCIRF REPORT, *supra* note 292, at 49.

³³⁶ *Id.* at 50; Tanya Datta, *Eritrean Christians Tell of Torture*, BBC NEWS, Sept. 27, 2010, <http://news.bbc.co.uk/2/hi/africa/7015033.stm>; see also Jonah Fisher, *Religious Persecution in Eritrea*, BBC NEWS, Sept. 17, 2004, <http://news.bbc.co.uk/2/hi/africa/3663654.stm> ("The government seems to have decided that anyone who does not follow a certain standard is an enemy of the people, is an enemy of the state. It is afraid that people who consider their highest allegiance to be God, at some point may not be patriotic and follow the state's instructions.").

Jehovah's Witnesses released from detention have reported being kept for months in a 20-foot metal shipping container holding over 20 individuals, most of whom were Jehovah's Witnesses but including several Pentecostals. Prisoners were permitted to leave the container for limited periods twice a day. Prisoners were urged to renounce their faith in writing, to return to their "previous faith" (understood to be the Coptic Orthodox Church), and ordered not to pray aloud, sing, or preach. No books were allowed. The punishment for disobedience was to be chained outdoors for a day and a night.³³⁷

The conditions, torture, and lack of medical attention have led to the deaths of many religious detainees.³³⁸ Those that are released "were also monitored afterward to ensure they did not practice or proselytize for their unregistered religion."³³⁹ The fear of reprisal from the government has forced adherents to minority religions to meet in secret,³⁴⁰ but such meetings are frequently interrupted by Eritrean officials.³⁴¹ Still others have become refugees, fleeing across the border into Ethiopia³⁴² "despite 'shoot-to-kill' orders for anyone caught crossing the border."³⁴³

Even the four registered religions³⁴⁴ face impediments to the "right to hold opinions"³⁴⁵ and the "freedom of expression."³⁴⁶ "The government interferes in the everyday workings of registered religious groups at the highest levels. . . . [A]ll faced abuses and interference in their religious affairs at the hands of the government."³⁴⁷ Most notably the Patriarch of the Eritrean Orthodox Church, Antonios, was ousted for objecting to government interference with the church, specifically regarding the conscription of Eritrean Orthodox priests into military service and the government clampdown on an evangelical "renewal movement" within the church.³⁴⁸

³³⁷ 2010 USCIRF REPORT, *supra* note 292, at 50; *see also* Datta, *supra* note 336 ("They kept asking me to sign a document," he recalls, "and agree to not participate in church activities or express my faith in any form. I was told I would be untied and released the minute I agreed to their requests."); Fisher, *supra* note 336 ("We were put into a metal shipping container with nine Jehovah's Witnesses; one of them was in his 90s. During the day it [was] very hot and at night very cold.").

³³⁸ *Christian Deaths Mount in Prisons*, COMPASS DIRECT NEWS, Jan. 21, 2010, <http://www.compassdirect.org/english/country/eritrea/1784/>.

³³⁹ 2009 INT'L RELIGIOUS FREEDOM REPORT, ERITREA, *supra* note 324.

³⁴⁰ Fisher, *supra* note 336.

³⁴¹ *See Eritrea Arrests Praying Women and Children*, INT'L CHRISTIAN CONCERN, May 13, 2010, <http://www.persecution.org/2010/05/13/eritrea-arrests-praying-women-and-children/>; *17 More Christian Men Thrown Into Prison in Eritrea*, INT'L CHRISTIAN CONCERN, Apr. 1, 2010, <http://www.persecution.org/2010/04/01/17-more-christian-men-thrown-into-prison-in-eritrea/>; *Eritrea Arrests 30 Praying Women, Relatives Say*, BBC NEWS, Dec. 11, 2009, <http://news.bbc.co.uk/2/hi/africa/8407704.stm>.

³⁴² Datta, *supra* note 336; *Eritrea: Religious Persecution Still Persists, New Report Says*, ALLAFRICA.COM, Jan. 16, 2009, <http://allafrica.com/stories/200901160686.html>.

³⁴³ *Eritrea: Religious Persecution Still Persists*, *supra* note 342.

³⁴⁴ *See* note 325 and accompanying text.

³⁴⁵ ICCPR, *supra* note 5, art. 19(1).

³⁴⁶ *Id.* art. 19(2).

³⁴⁷ INST. ON RELIGION AND PUB. POL'Y, *supra* note 324.

³⁴⁸ *Eritrean Orthodox Churches Closing Their Doors at an Alarming Rate*, INCHAINSFORCHRIST.ORG, Mar. 17,

The elderly Antonios has been incommunicado, reportedly in solitary confinement, since 2007.³⁴⁹

The Eritrean government continues to deny that religious minorities are denied any rights, let alone persecuted because of their beliefs.³⁵⁰ According to BBC News the Eritrean Embassy in London stated, “Accusations allegedly being made that the government of Eritrea is restricting religious freedom are baseless . . . [f]acts on the ground show a very different picture to the one presented by organisations or individuals.”³⁵¹ However, the United States Commission on International Religious Freedom (USCIRF) reported that “[g]overnment officials have criticized ‘non-traditional’ Christian denominations for engaging in evangelism that is allegedly socially divisive, aggressive, and alien to Eritrea’s cultural traditions.”³⁵² USCIRF also stated that “Eritrea has legitimate concerns regarding violent Islamists,”³⁵³ but that “[n]one of the accused Christian groups are known to have engaged in or advocated violence.”³⁵⁴ In the opinion of a former BBC correspondent in Eritrea, “[t]he government seems to have decided that anyone who does not follow a certain standard is an enemy of the people, is an enemy of the state.”³⁵⁵

The withdrawal or expulsion of many NGOs and the severe restrictions on the Eritrean press has limited the availability of specific reports on the oppression of adherents to minority faiths in Eritrea. Still, some recently documented instances of abuse of religious minorities in violation of the rights enumerated in the ICCPR are available:

- “Eritrean officials arrested eleven Christians, including women and children, in the Eritrean capital of Asmara. Pastor Mesfin, Pastor Tekie, Mr. Isaac and his four children, and four women were arrested while conducting a prayer meeting at a private home in Maitemenai, Asmara. The detainees are members of Faith Church of Christ. The church has existed in Eritrea since 1950. It was among the evangelical churches that were banned by Eritrean officials in 2002.”³⁵⁶

2010, http://www.inchainsforchrist.org/index.php?option=com_content&view=article&id=92:eritrean-orthodox-churches-closing-their-doors-at-an-alarming-rate&catid=40:press-releases&Itemid=59; *Eritrea: Religious Persecution Still Persists*, *supra* note 342; *Eritrea Church Leader Dismissed*, BBC NEWS, Aug. 26, 2005, <http://news.bbc.co.uk/2/hi/africa/4187362.stm>.

³⁴⁹ *Eritrea: Religious Persecution Still Persists*, *supra* note 342.

³⁵⁰ See *Freedom of Religion: Eritrea’s Violation of Domestic and International Obligations*, INCHAINSFORCHRIST.ORG, Oct. 22, 2008, http://www.inchainsforchrist.org/index.php?option=com_content&view=article&id=76:freedom-of-religion-eritreas-violation-of-domestic-and-international-obligations-&catid=37:documents&Itemid=56; Fisher, *supra* note 336.

³⁵¹ *Eritrea Targeting ‘Permitted’ Churches*, BBC NEWS, Apr. 20, 2006, <http://news.bbc.co.uk/2/hi/africa/4924252.stm>; see also Fisher, *supra* note 336 (“I was asked to leave Eritrea before I could get a government response to my research and experiences, but a statement from the foreign ministry rejected accusations of religious persecutions from the United States.”).

³⁵² 2010 USCIRF REPORT, *supra* note 292, at 48.

³⁵³ *Id.* at 49.

³⁵⁴ *Id.* at 48 (emphasis added).

³⁵⁵ Fisher, *supra* note 336.

³⁵⁶ *Eritrea Arrests Praying Women and Children*, *supra* note 341.

- “Military officials on Saturday, March 27, 2010, arrested 17 young men gathered for prayer in a town called Segenaite in southern Eritrea, Africa. The men are apparently Christian soldiers doing their compulsory national military service. They belong to various churches. . . . These arrests bring to 28 the reported number of Christians arrested since the beginning of March for their refusal to stop worshipping outside of the government sanctioned Eritrean Orthodox, Catholic and Evangelical Lutheran churches.”³⁵⁷
- “Thirty elderly women have been arrested in Eritrea while praying together, one of their relatives living in the United States has told the BBC. . . . Most of the women belonged to an outlawed evangelical group.”³⁵⁸
- “In June 2008 Compass Direct reported that plainclothes police arrested two Christians in Massawa for proselytizing.”³⁵⁹

NIGERIA

A. Introduction

Religious freedom is generally respected by Nigeria’s government, but in recent years, inaction by Nigeria’s government to protect religious freedom has permitted sectarian violence to abound without threat of punishment.³⁶⁰ Specifically, Nigeria’s Constitution provides that “[e]very person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.”³⁶¹ The Constitution’s text declares freedom of expression and states, “Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference,”³⁶² and “[e]very person shall be entitled to assemble freely and associate with other persons.”³⁶³ In addition to constitutional protection, Nigeria has ratified the ICCPR,³⁶⁴ but Nigeria has not agreed to the First Optional Protocol.³⁶⁵

³⁵⁷ *17 More Christian Men Thrown Into Prison in Eritrea*, *supra* note 341.

³⁵⁸ *Eritrea Arrests 30 Praying Women*, *supra* note 341.

³⁵⁹ 2009 INT’L RELIGIOUS FREEDOM REPORT, ERITREA, *supra* note 324.

³⁶⁰ 2010 USCIRF REPORT, *supra* note 292, at 80; U.S. DEP’T OF STATE, INT’L RELIGIOUS FREEDOM REPORT 2009, NIGERIA [hereinafter 2009 INT’L RELIGIOUS FREEDOM REPORT, NIGERIA], *available at* <http://www.state.gov/g/drl/rls/irf/2009/index.htm>.

³⁶¹ CONSTITUTION OF NIGERIA (1999), § 38.

³⁶² *Id.* at § 39.

³⁶³ *Id.* at § 40.

³⁶⁴ U.N. Status of Treaties, *supra* note 138.

³⁶⁵ Status of Optional Protocol, *supra* note 295.

B. Enforcement of Constitutional Provisions

Although the Constitution provides for broad religious freedom, especially in the area of religious speech, governmental authorities in Nigeria have done little to prosecute those who have perpetrated violence as a result of the religious tension in Nigeria.³⁶⁶ The religious tension is evidenced by Nigeria's religious demographic: fifty percent Muslim, forty percent Christian, and ten percent indigenous religious beliefs.³⁶⁷ The northern states are predominately Muslim, while the southern states are predominately Christian.³⁶⁸ The actions of Nigeria's government have, thus far, proven to be insufficient or dilatory. Following several hundred deaths and church burnings in early 2010, Goodluck Jonathan, the Acting President of Nigeria, implemented an advisory committee to research the causes behind the violence and issued recommendations to prevent future violence.³⁶⁹ However, a pattern of inaction has resulted from the many advisory committees in the past.³⁷⁰ Recommendations are not implemented and the reports are never released to the public.³⁷¹ Also, another indication of Nigeria's lackadaisical attitude regarding the prevention of sectarian violence is its lack of a response to USCIRF's request for information regarding Nigeria's investigations or prosecutions on major violent sectarian incidents since 1999.³⁷²

C. Violations of Constitutional Provisions

Recent incidents constitute blatant violations of both the Nigerian Constitution and the ICCPR. A few of the northern states in Nigeria banned religious activities citing public safety and security concerns, despite constitutional protection for proselytization.³⁷³ For example, the northern states in Nigeria have banned open-air religious meetings and proselytization on a case-by-case basis to prevent incitement of ethno-religious violence.³⁷⁴ Also, the USCIRF reports that northern states make it very difficult to build non-Muslim worship centers by denying permit applications.³⁷⁵ In 2001, following the implementation of Shari'a law in the state of Kano, seventeen churches were demolished because they failed to possess the proper building permits.³⁷⁶ Past reports indicate that authorities have cited zoning laws as justification for their

³⁶⁶ 2010 USCIRF REPORT, *supra* note 292, at 80.

³⁶⁷ 2009 INT'L RELIGIOUS FREEDOM REPORT, NIGERIA, *supra* note 360.

³⁶⁸ *Id.*

³⁶⁹ 2010 USCIRF REPORT, *supra* note 292, at 82.

³⁷⁰ *Id.*

³⁷¹ *Id.*

³⁷² *Id.*

³⁷³ *Id.* at 84.

³⁷⁴ Special Rapporteur, *Report of the Special Rapporteur on Freedom of Religion or Belief in Nigeria, Asma Jahangir*, ¶ 33, delivered to the Economic and Social Council and the Commission on Human Rights, U.N. Doc. E/CN.4/2006/5/Add.2 (Oct. 7, 2005) [hereinafter *Freedom of Religion or Belief in Nigeria*]; UK BORDER AGENCY, COUNTRY OF ORIGIN INFORMATION REPORT: NIGERIA § 15.03 (2008), available at <http://rds.homeoffice.gov.uk/rds/pdfs08/nigeria-081208.doc#annexe>; U.S. DEP'T OF STATE, 2009 HUMAN RIGHTS REPORT: NIGERIA (2009), available at <http://www.state.gov/g/drl/rls/hrrpt/2009/af/135970.htm>.

³⁷⁵ 2010 USCIRF REPORT, *supra* note 292, at 84.

³⁷⁶ JIBRIN IBRAHIM, INTERNATIONAL HUMAN RIGHTS LAW GROUP, DEMOCRACY AND MINORITY RIGHTS IN NIGERIA: RELIGION, SHARI'A, AND THE 1999 CONSTITUTION 17-18 (2002), available at <http://www2.ucsc.edu/cgirs/conferences/carnegie/papers/ibrahim.pdf>.

restrictions on buildings; however, the authorities applied those zoning laws only to places of worship,³⁷⁷ especially non-Muslim places of worship.³⁷⁸ The discrimination continues through the present year. In February 2010, Compass Direct reported that certificates of occupancy were refused for almost every church in northern Nigeria. These refusals have forced churches in the northern states to operate as underground churches.³⁷⁹ The problem of denying buildings for non-Muslim worship centers began many years ago, but this problem remains prevalent in northern Nigeria. The actions of the northern Nigerian states clearly violate the right to “freely assemble” under section 40 of the Nigerian Constitution, but there is no evidence that the Nigerian government has done or will do anything to stop this discrimination.

Other incidents of religious persecution, in violation of the Nigerian Constitution and the ICCPR, have been reported throughout Nigeria. In its 2008 International Religious Freedom Report, the United States Department of State reported that the Nigerian government had “sporadically enforced a ban against broadcasting religious advertisements on state-owned radio and television stations.”³⁸⁰ In October 2007, Nigeria also banned a playwright’s satire about the implementation of Shari’a law, entitled “Phantom Crescent.”³⁸¹ The play insinuated that Nigerian politicians favored Shari’a law because it would protect them from opposition when they abused their political power.³⁸²

More recently, on 6 July 2010, churches reported that a noise pollution law in the state of Lagos violated their freedom to worship.³⁸³ The Lagos state chapter of the Christian Association of Nigeria stated that a law dictating “the time, period and frequency of worship service” violated their “freedom of thought, conscience and religion guaranteed by the Constitution of the country.”³⁸⁴ The state’s Environmental Protection Agency closed at least seven churches on the condition that they pay a fine and sign an agreement to lower their noise levels.³⁸⁵ These incidents indicate that the Nigerian government does not respect the freedom of expression guaranteed by the Constitution.

Violent acts in which religion was a factor remain the most ignored violation of religious freedom by the Nigerian authorities. Since 1999, over 12,000 Christian and Muslim Nigerians have died due to sectarian violence.³⁸⁶ Throughout Nigeria, Muslims have attacked Christians

³⁷⁷ *Freedom of Religion or Belief in Nigeria*, Asma Jahangir, *supra* note 374, at ¶ 43.

³⁷⁸ *Christians in Nigeria Decry Police Inaction in Church Burnings*, COMPASS DIRECT NEWS, Feb. 26, 2010, <http://www.compassdirect.org/english/country/nigeria/15693/>; 2010 USCIRF REPORT, *supra* note 292, at 84.

³⁷⁹ *Christians in Nigeria Decry Police Inaction in Church Burnings*, *supra* note 378.

³⁸⁰ U.S. DEP’T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2008, NIGERIA, *available at* <http://www.state.gov/g/drl/rls/irf/2008/>.

³⁸¹ *Nigeria: Playwright’s Shari’a Satire Banned*, INT’L RELIGIOUS FREEDOM NEWS, Oct. 7, 2007, <http://becketinternational.wordpress.com/2007/10/07/nigeria-playwrights-sharia-satire-banned/>.

³⁸² *Id.*

³⁸³ Lekan Otufodunrin, *Nigerian Christians Say Noise Pollution Law Hinders Worship*, INT’L CHRISTIAN CONCERN, July 11, 2010, <http://www.persecution.org/2010/07/11/nigerian-christians-say-noise-pollution-law-hinders-worship/>.

³⁸⁴ *Id.*

³⁸⁵ *Id.*

³⁸⁶ 2010 USCIRF REPORT, *supra* note 292, at 80.

merely for proselytizing.³⁸⁷ On 27 April 2010, Nigerian Muslims in Jos murdered two journalists that worked for “The Light Bearer” Newspaper published by the Church of Christ.³⁸⁸ International Christian Concern reported that the journalists were killed by Muslims when the Muslims found out they were working for a Christian newspaper.³⁸⁹ Shortly before this incident, on 17 January 2010, Muslim youths killed almost fifty Christians, including two pastors.³⁹⁰ The Muslim youths burned ten church buildings and attacked a Catholic church.³⁹¹ The Christian Association claimed that the Muslim youths’ boldness resulted from Nigerian officials’ failure to arrest perpetrators of previous violent attacks.³⁹² The leader of the Christian Association in Nigeria stated, regarding the attacks, that there had been “no response from the police, and even the state governor has refused to meet with us.”³⁹³

Earlier, on 7 August 2009, three pastors and nine other Christians from the Christian community in Lagos were killed in riots initiated by the Islamic sect, Boko Haram,³⁹⁴ which means “Western education is sacrilege.”³⁹⁵ Members of Boko Haram abducted many Christians and killed the abducted Christians who refused to renounce Christianity.³⁹⁶ Boko Haram wants Shari’a law to be imposed on all of Nigeria instead of just the twelve northern states that enforce Shari’a law against Muslims.³⁹⁷ A representative of the Christian Association said the organization did not believe the government could protect the lives and property of Christians in Nigeria.³⁹⁸

These incidents represent merely a few examples of the extreme sectarian violence that occurs in Nigeria each year. The Nigerian authorities have done nothing to prevent future sectarian violence or to prosecute those who have already committed violence. The Nigerian authorities’ inaction has allowed Muslim communities to stifle the freedom to proselytize through fear of future attacks.

³⁸⁷ IBRAHIM, *supra* note 376, at 9.

³⁸⁸ *Two Church of Christ in Nigeria Journalists Killed in Jos*, COMPASS DIRECT NEWS, Apr. 27, 2010, <http://www.compassdirect.org/english/country/nigeria/18010/>.

³⁸⁹ *Muslim Mob Brutally Murder Two Christian Journalists in Nigeria*, INT’L CHRISTIAN CONCERN, Apr. 27, 2010, <http://www.persecution.org/2010/04/27/muslim-mob-brutally-murder-two-christian-journalists-in-nigeria/>.

³⁹⁰ *Christians in Nigeria Decry Police Inaction in Church Burnings*, *supra* note 378.

³⁹¹ *Id.*

³⁹² *Id.*

³⁹³ *Id.*

³⁹⁴ *Death Toll Climbs in Attack by Islamic Sect*, COMPASS DIRECT NEWS, Aug. 7, 2010, <http://www.compassdirect.org/english/country/nigeria/4505/>.

³⁹⁵ 2010 USCIRF REPORT, *supra* note 292, at 83.

³⁹⁶ *Death Toll Climbs in Attack by Islamic Sect*, *supra* note 394.

³⁹⁷ *Id.*

³⁹⁸ *Id.*

KENYA

A. Introduction

The Kenyan people have enjoyed relatively stable legal protections regarding religious free speech rights; however, the recent adoption of a new constitution makes the status of those rights somewhat unclear. Kenya has a population of approximately 39 million.³⁹⁹ Nearly eighty percent of Kenyans are Christian, ten percent are Muslim, ten percent adhere to a variety of native religions, and less than one percent are Hindu, Baha'i, or Sikh.⁴⁰⁰ Of Christians, fifty-eight percent are Protestant and forty-two percent are Catholic.⁴⁰¹ Seventy-five percent of the Muslim population lives in the North Eastern, Upper Eastern, and Coast Provinces.⁴⁰²

Generally, Kenya's laws and policies contribute to the free exercise of religion, and there have been few reports of discrimination based on religious belief or practice.⁴⁰³ Kenya acceded to the ICCPR in 1972⁴⁰⁴ but has not signed the First Optional Protocol.⁴⁰⁵

This section will survey the protections for religious speech under Kenya's old and new constitutions and will examine how Kenyan laws contribute to or detract from the freedom to engage in various forms of religious speech protected by the ICCPR.

B. Religious Speech Rights

Although Kenya now has a new Constitution (see discussion below), Kenya's prior Constitution explicitly provided for freedom of religion and the freedom to spread one's religion. Article 78 permitted citizens to "manifest and *propagate* [their] religion or belief in worship, teaching, practice and observance."⁴⁰⁶ Religious groups possessed the right to establish religious schools in their communities without government hindrance and to propagate their religion through education.⁴⁰⁷

Kenya requires all religious groups to register with the government as part of its

³⁹⁹ U.S. DEP'T OF STATE, HUMAN RIGHTS REPORT 2009: KENYA (2010) [hereinafter 2009 HUMAN RIGHTS REPORT: KENYA], available at <http://www.state.gov/g/drl/rls/hrrpt/2009/af/135959.htm>; see also CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK, KENYA [hereinafter CIA WORLD FACTBOOK, KENYA], <https://www.cia.gov/library/publications/the-world-factbook/geos/ke.html> (last updated Sept. 8, 2010) (population is 39,002,772).

⁴⁰⁰ U.S. DEP'T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2009, KENYA (2009) [hereinafter 2009 INT'L RELIGIOUS FREEDOM REPORT, KENYA], available at <http://www.state.gov/g/drl/rls/irf/2009/127238.htm>.

⁴⁰¹ 2009 INT'L RELIGIOUS FREEDOM REPORT, KENYA, *supra* note 400.

⁴⁰² *Id.* There are seven provinces and one area in Kenya which include: Central, Coast, Eastern, North Eastern, Nyanza, Rift Valley, Western, and Nairobi Area. CIA WORLD FACTBOOK, KENYA, *supra* note 399.

⁴⁰³ 2009 INT'L RELIGIOUS FREEDOM REPORT, KENYA, *supra* note 400.

⁴⁰⁴ U.N. Status of Treaties, *supra* note 138.

⁴⁰⁵ Status of Optional Protocol, *supra* note 295.

⁴⁰⁶ CONSTITUTION, art. (78)(1) (Kenya) (2008 revised edition), available at http://www.kenyadocex.com/uploads/2/7/3/5/2735307/the_constitution.pdf

⁴⁰⁷ *Id.* (78)(2). Religious education classes could not be forced upon anyone against their will. *Id.* art. (78)(3).

framework to promote religious freedom and the freedom to propagate one's religion.⁴⁰⁸ The registration process is not particularly cumbersome, and there have been few reports of discrimination or denial of registration.⁴⁰⁹ Religious groups such as churches must register with the "Registrar of Societies" pursuant to the Societies Act (Cap 108).⁴¹⁰ Groups that are not registered or exempted in Kenya are considered unlawful societies.⁴¹¹ Each group must fill out an application and pay a registration fee of 2,000 shillings (approximately \$25 USD). Once the Registrar has received the application and fee, it has 120 days to either register the group or exempt it from registration.⁴¹² The decision whether to exempt or register a group is "purely at the discretion of the Minister."⁴¹³ Registered societies must pay an annual fee (anywhere from about 200 to 1,000 shillings (approximately \$2.50–\$12.50 USD) based on the number of members) and file an annual report with the Registrar. In addition to the annual report, registered groups must receive permission from the government to make any organizational changes.⁴¹⁴ Also, religious groups holding public events must receive permission from the Environmental Authority to be able to exceed the permissible noise level. Permission is generally given, but each group must pay a fee.⁴¹⁵

⁴⁰⁸ 2009 HUMAN RIGHTS REPORT, KENYA, *supra* note 399.

⁴⁰⁹ *Id.*

⁴¹⁰ The Society Act, Chapter 108, sec. 2(1) (Feb. 16, 1968) (Kenya), *available at* www.imolin.org/doc/amlid/Kenya_Societies_Act.pdf. Society is defined as follows:

["Society"] includes any club[,] company, partnership or other association of ten or more persons, whatever its nature or object, established in Kenya or having its headquarters or chief place of business in Kenya, and any branch of a society, but does not . . . include—

- (a) a company as defined by the Companies Act. or a company registered as a foreign company under Part X of that Act;
- (b) any corporation incorporated by or under any other written law;
- (c) a registered trade union within the meaning of that Act and a trade union or a branch of a trade union whose application for registration has been made and not determined;
- (d) a company, firm, association or partnership consisting of not more than twenty persons, formed and maintained with a view to carrying on business for profit;
- (e) a co-operative society registered as such under any written law;
- (f) a school registered under the Education Act, advisory council[,] Board of Governors, District Education Board, school committee or similar organization established under and in accordance with the provisions of any written law relating to education;
- (g) a building society as defined by the Building Societies Act;
- (h) a bank licensed under the Banking Act;
- (i) any international organization of which Kenya is a member, or any branch, section or organ of any such organization;
- (j) any combination or association which the Minister may, by order, declare not to be a society for the purposes of this Act.

Id.; *see also* Republic of Kenya, The State Law Office, Society Section Services [hereinafter Society Section Services], http://www.attorney-general.go.ke/index.php?option=com_content&task=view&id=81&Itemid=117 (last visited Sept. 21, 2010).

⁴¹¹ The Society Act, *supra* note 410, ch. 108, sec. 4(1).

⁴¹² The Registrar can refuse to register the group "[i]f an application does not comply with the societies [sic] rules." Society Section Services, *supra* note 410. The group then has the opportunity to appeal the denial. *Id.*

⁴¹³ *Id.*

⁴¹⁴ *Id.*

⁴¹⁵ East African Center for Law and Justice (eacj.org), September 2010 inner-office memorandum [hereinafter

Despite the registration and licensing requirements, the freedom to propagate one's religion provided in article 78 has largely been observed in practice. "Door to door evangelism [and] passing of tracts in traffic" are common.⁴¹⁶ Most mainstream media stations have religious programming—Islamic programs on Friday and Christian programs almost daily.⁴¹⁷ Television is also filled with religious programming. Three channels are specifically dedicated to Christian matters: TBN/Family Media, Good News Bible Station, and God TV/Sayare Media.⁴¹⁸

Previous laws and policies of Kenya contributed to a general freedom regarding religious speech rights;⁴¹⁹ however, isolated incidents of discrimination did occur. Muslims in Kenya have complained that the Kenyan government has expressed hostility towards them and alleged that the Kenyan government has frustrated attempts for Muslims to proselytize under a pretense of fighting terrorism.⁴²⁰ In the largely Muslim northern region, Christians have also made occasional complaints of unfair treatment. For example, Compass Direct reported that after a gang of Muslim youths destroyed a church in Garissa, located in northern Kenya near the Somali border,⁴²¹ at least six months later government officials still "ha[d] done nothing to punish the culprits or restore [the church's] structure."⁴²² The church merely asked for permission to build a new structure nearby or simply return to their previous site so they could continue normal activities, but the government did not respond.⁴²³ Local police claimed it was the responsibility of the provincial commissioner to remedy the situation and the provincial commissioner claimed it was the responsibility of the "district commissioner."⁴²⁴

In spite of the occasional complaints by Muslim minorities and the Christians in the north, the above legal provisions have enabled Kenyans to enjoy a large measure of freedom of religious speech—including proselytization.

2010 EACLJ Memorandum] (on file with author).

⁴¹⁶ *Id.*

⁴¹⁷ *Id.*

⁴¹⁸ *Id.*

⁴¹⁹ 2009 HUMAN RIGHTS REPORT: KENYA, *supra* note 399.

⁴²⁰ 2009 INT'L RELIGIOUS FREEDOM REPORT, KENYA, *supra* note 400. For example, Kenya deported Abdullah al-Faisal in January 2010. The Muslim cleric was previously "imprisoned in Britain in 2003 after being convicted of preaching racial hatred. He was accused of calling for the murder of Jews and Hindus and was allegedly a strong influence on one of the bombers of the July 2005 London attacks." Kenya's anti-terrorism unit captured him in Mombassa and then the government decided to deport him. Apparently he gained entry into Kenya through a port from Tanzania that is not connected to the government's central database. Muslim leaders were outraged: "We feel harassed as Muslims. What the government should do is to involve the Muslim leaders in Kenya in clearing the people who come here." Alan Boswell, *Kenya to Deport Controversial Muslim Cleric*, VOA NEWS, Jan. 4, 2010, <http://www.voanews.com/english/news/religion/Kenya-To-Deport-Controversial-Muslim-Cleric-80634617.html>.

⁴²¹ *Church Struggling After Islamists Destroy Building*, COMPASS DIRECT NEWS, Mar. 5, 2009, <http://www.compassdirect.org/english/country/kenya/2369/>.

⁴²² *Id.*

⁴²³ *Id.*

⁴²⁴ *Id.*

C. Kenya's New Constitution

As evident from the text, the old Constitution explicitly provided religious groups with the right to propagate their religion in general, as well as to spread their faith through schools and institutions. Kenya, however, recently passed a new Constitution on 27 August 2010.⁴²⁵ The new Constitution slowly rescinds citizens' and religious groups' right to proselytize.⁴²⁶ Most significantly, "propagate," a word found in the old Constitution, was removed from the religious rights section:

- (1) Every person has the right to freedom of conscience, religion, thought, belief and opinion.
- (2) Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship.⁴²⁷

On its face, the new Constitution largely preserves religious freedom. But the deliberate removal of the word "propagate," coupled with the fact that religious groups are still required to register with the government, has the potential to jeopardize Kenya's commitment to the ICCPR to allow citizens to freely spread their religion. Groups who actively proselytize could now experience a restriction of their rights. The United Nations should take notice of these changes and monitor Kenya accordingly.

CONCLUSION

To preserve freedom of expression, all individuals and groups, including those holding sincere religious beliefs, must tolerate critical public statements and debate about their activities, teachings, and beliefs. To preserve freedom of expression, "incitement" under article 20 of the ICCPR must be understood to include both a subjective and an objective component. First, the speaker must have a malicious intent to incite severe and imminent violence. Second, whether the expression incites imminent violence must be adjudged from an objective standard and not from the perspective of the individual or group claiming offence. Only when the term "incitement" is analyzed from both the subjective intent of the speaker and an objective view, does article 20 truly ensure that the freedom of expression enshrined in article 19 will be respected. Anything less and societies will be held hostage to the excessive sensitivities of certain individuals and the groups in the majority.

This report reflects how different nations have succeeded or failed in their attempts to preserve religious expression while adhering to "incitement" laws. The ECHR case law attempts

⁴²⁵ *Kenya President Ratifies New Constitution*, BBC NEWS, Aug. 27, 2010, <http://www.bbc.co.uk/news/world-africa-11106558>.

⁴²⁶ 2010 EACLJ Memorandum, *supra* note 415.

⁴²⁷ CONSTITUTION, art 32 (2010) (Kenya), <http://www.nation.co.ke/blob/view/-/913208/data/157983/-/18do0kz/-/published+draft.pdf>.

to take into account the various social, political, and religious contexts in Europe and has developed criteria that may apply outside Europe. But even the ECHR recognizes that an international body must give great deference to the sovereignty of individual nations and their individual rule of law. The history of Pakistan's blasphemy laws represents how, if "incitement" is viewed from the perspective of the individual or group claiming offence, the law can be used as a sword against the minority. This perspective defeats the original intent of "incitement" laws—to shield the minority—and results in the destruction of free expression.

As this issue is debated, it is important to remember that public expressions by those with a sincerely held faith or religious morality should receive a superior level of protection. Those individuals or groups with sincerely held religious beliefs must be free to criticize or comment on behaviours that the tenets of their faith consider immoral. These public expressions of faith or religious morality should not be liable to prosecution simply because the tenets of the faith oppose certain ideas or practices; such expressions are fundamentally protected by article 19 and expressed peacefully. Society must not fear debate, for it is through open discussion that ideas should be countered and respect given to a diversity of views. In the balance between article 19's freedom of expression and article 20's prohibition of "incitement," the balance must protect statements of disagreement with or criticism of a particular ideology. If "incitement" is analyzed from the perspective of those claiming offence by a particular expression or lacks the requirement that the speaker intend to incite imminent violence, article 20 will effectively chill expression and encourage the majority to squelch any controversial expression by the minority. Instead, article 20 of the ICCPR should target only malicious expressions and expressions that objectively incite imminent violence. This balance forbids intentional and grave offences while preserving a forum for the free debate of ideas.