THE HIGH LEVEL PANEL OF LEGAL EXPERTS ON MEDIA FREEDOM

The independent advisory body to the Media Freedom Coalition

International Bar Association
Human Rights Institute

On Religious Freedom and Discontent: Report on International Standards and Blasphemy Laws

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This IBAHRI publication is a report of the High Level Panel of Legal Experts on Media Freedom, authored by Panel Member, Karuna Nundy, lawyer at the Supreme Court of India and international lawyer.

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The High Level Panel's remit is to provide legal advice and recommendations to the Coalition and its partners, including international organisations, for the purposes of promoting and protecting a vibrant, free, and independent media. The High Level Panel also provides individual States with legal advice in the form of legal opinions on draft legislation or legislation already in force, where media freedoms are engaged, as well as amicus curiae opinions at the request of a constitutional court or an international court in a media freedom case of general public importance.

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On Religious Freedom and Discontent: Report on International Standards Relating to Blasphemy Laws and Media Freedom

An International Bar Association Human Rights Institute Report

May 2023

Drafted by: Ms Karuna Nundy

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Introduction

Laws prohibiting blasphemy present a peculiar challenge to journalism. Blasphemy laws privilege dominant religious orthodoxies and freeze hierarchies between religions by limiting speech that encourages reform towards human rights principles.

In this way, they prevent religions from evolving with changing circumstance – limiting reportage and opinion that implicates religious ideas then also slows or halts such development. Indeed, in the current profusion of ethno-religious political dispensations, the blasphemy law also has a serious chilling effect on political journalism.

Blasphemy laws prohibiting speech that is critical of or insulting to a religion are incompatible with international human rights law, except in certain limited circumstances. Under international law, such prohibitions are only permissible if they penalise 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence' as set out in Article 20(2) of the International Covenant on Civil and Political Rights.[1]

The right to freedom of thought, conscience and religion under Article 18 is often analysed as a right that must be balanced against free speech under Article 19, and Article 20 which sets out allowable restrictions to free speech. A bare reading of the articles, however, makes it clear that Articles 18, 19 and 20 are designed to mutually reinforce each other.

Yet almost half the world – at least 95 countries – currently have laws that punish blasphemy.[2] This proportion is higher in certain regions: all countries studied in the Middle East and North Africa had some form of blasphemy law, with 70 per cent of Asian states also prohibiting blasphemy. While some countries, especially in Europe, have repealed their blasphemy laws, others maintain them and states such as Mauritania, Nepal, Oman and Russia have strengthened them.[3] Almost all these blasphemy laws are criminal laws that provide for prison terms. And at least four codified blasphemy laws impose the death penalty for this crime.[4]

Consequently, international law on blasphemy laws stands in stark contrast to state practice, which still includes many such laws on the books, including Western democracies and across Europe, although in some of these countries they have fallen into disuse. State practice also reveals that blasphemy laws have been used to chill journalism; it has limited reportage and opinion that implicates religious ideas. For instance, the use of blasphemy laws to limit media freedom has been observed in many states including Afghanistan, Algeria, Egypt, India, Indonesia, Iran, Mauritania, Pakistan, Russia and Saudi Arabia. In some of these countries,

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1 HRC General Comment No. 34, *Article 19, right to freedom of speech and expression*, 12 September 2011 §48.

2 Global Blasphemy Laws Table **<www.ibanet.org/document?id=Global-Blasphemy-Laws-Table>** accessed 11 April 2023.

3 See section 4.2 on Introduction of new laws and strengthening blasphemy laws.

4 See United States Commission on International Religious Freedom, 'Violating Rights: Enforcing the World's Blasphemy Laws', 2020, p. 34 **<www.uscirf.gov/sites/default/files/2020%20Blasphemy%20Enforcement%20Report%20_final_0.pdf>** accessed 22 June 2021 ('Mauritania has joined Brunei, Iran, and Pakistan as the countries in the world with the death penalty as punishment for insult to religion.'), but note that it is also carried out in Afghanistan, Nigeria and Saudi Arabia. See also Humanists International, 'Freedom of Thought' (2020) **<https://fot.humanists.international/general-introduction/#Apostasy_and_blasphemy_laws>** accessed 25 June 2021 ('In fact, at least 10 countries in which "apostasy" is punishable, it is punishable with death in whole or in part of the country (Afghanistan, Iran, Malaysia, Maldives, Mauritania, Nigeria, Qatar, Saudi Arabia, United Arab Emirates, Yemen)').

the crime is punishable by death and has led to executions.[5]

Contrary to international law, the morality of prohibitions on blasphemy is contested at regional and national levels, and indeed in sub-national democratic conversations between courts, governments, the media and citizens. However, journalism and indeed truth itself have fallen victim to blasphemy laws.

For example, in Iran, in response to the mass protests in 2022 following Mahsa Amini's death in police custody,[6] there has been a government crackdown on journalistic free speech. Around 95 journalists were arrested in the aftermath of the protest, in some cases under charges of blasphemy.[7] One such case is that of sports journalist Ehsan Pirbornash who was arrested in October 2022 for openly supporting and reporting the protests that followed Mahsa Amini's death via Twitter.[8] He was arrested and convicted for (i) insulting Islam in a manner deemed blasphemous, (ii) inciting aggression against the Islamic Republic's government, and (iii) spreading propaganda against the Islamic Republic's system. He was sentenced to 18 years' imprisonment (of which eight years was suspended).[9]

Repealing anti-blasphemy laws across the globe is critical towards guaranteeing freedom of speech and expression, as well as achieving religious freedom. The international discourse on blasphemy laws would, however, be incomplete without also addressing blasphemous religious hate speech or speech that appears to target a religious idea but in fact targets the followers of a religion.

Scope, methodology and acknowledgements

This report is set out in five parts. First, it refers to the author's and National Law University Delhi's original work compiling blasphemy laws globally. It then sets out the key elements of international free speech standards and how they relate to blasphemy. The report then tests blasphemy laws and analyses how and why they fail to meet these minimum requirements.

Second, it analyses the overlap between blasphemy and hate speech.

Third, it analyses how the implementation of blasphemy laws by states damages journalism and often falls short of minimum fair trial and due process standards, with a focus on the prosecution of journalists under these laws.

Fourth, it considers recent reforms to blasphemy laws, both to repeal or reduce their impact as well as to strengthen them.

And finally, it provides recommendations for states regarding blasphemy laws.

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5 For instance, in Iran, a man was reportedly executed in 2011 for the crime of apostasy, and another in 2014, for insulting the Prophet and heresy. See Advocates for Human Rights, 'Human Rights Record in Islamic Republic of Iran', 25 February 2015, A//HRC/28/NGO/131, p. 4.

6 In September 2022, Mahsa Amini, a 22-year-old Kurdish-Iranian woman was arrested in Tehran. Iran's morality police, tasked with detaining people to promote virtue and prevent vice, arrested her for wearing her hijab in an 'improper' manner. Amini fell into a coma and died three days into her detention due to what is widely alleged as severe beatings by law enforcement. See BBC, 'Mahsa Amini: Iran police say woman's death was unfortunate' (19 September 2022) **<www.bbc.com/news/world-middle-east-62954648>** accessed 11 April 2023.

7 CPJ, 'Names of journalists arrested in Iran's anti-state protests', 30 September 2022, **<https://cpj.org/2022/09/names-of-journalists-arrested-in-irans-anti-state-protests>** accessed 11 April 2023.

8 CPJ, 'Ehsan Pirbornash', **<https://cpj.org/data/people/ehsan-pirbornash>** accessed 11 April 2023.

9 Reporters without Borders, 'Iranian journalist gets long jail term for satirical comments about mullah regime', **<https://rsf.org/en/iranian-journalist-gets-long-jail-term-satirical-comments-about-mullah-regime>** accessed 11 April 2023.

Blasphemy, in this report, includes laws regulating speech that insults or defames one or more gods, the tenets, leaders or followers of a particular religion or religion in general. It includes laws framed as 'blasphemy' in national systems as well as laws penalising apostasy (which bar the abandonment or renunciation of religious faith) or heresy (which penalise opinion or doctrine contrary to the accepted dogma).

This report is not an exhaustive survey of such laws nor does it cover general defamation laws, hate speech laws, or the international standards relating to these laws more generally. The primary research for this report was largely carried out between 2019 and 2020. While efforts have been made to capture recent updates and amendments to laws up to April 2023, such information may not be entirely covered within this report.

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1. Testing blasphemy laws against international law standards

This section examines current trends in blasphemy laws (contained in the Global Blasphemy Laws Table annexed to this report),[10] which have been retained by states and tests them more generally against international law regarding blasphemy and restrictions to speech.

1.1 Prevalence of blasphemy laws across the world

This report has established that about 95 states currently have laws on blasphemy.[11] In the Middle East and North Africa (MENA) region, all 22 states studied had at least one form of blasphemy law.[12] In Asia, at least 21[13] out of 30 states (70 per cent) have such laws. In Europe, 19[14] out of 44 states (43.18 per cent) have blasphemy laws. In Oceania, five out of 14 states (25.7 per cent) retain blasphemy laws.[15] In Africa (excluding the MENA region), 18[16] of the 46 states (39.13 per cent) have blasphemy laws. Four of the 22 states (18.18 per cent) in Central and Latin America,[17] and seven out of 11 states (63.63 per cent) in the Caribbean,[18] have laws that prohibit blasphemy.

The nature of these laws in those 95 states varies widely in their punishments, requirement of intent and even the nature of the offence (some are civil, not criminal). A few are dormant and have never been used. The US Supreme Court has found blasphemy laws unconstitutional; however, they remain on the books in a handful of states.[19]

Almost all states that limit blasphemy impose criminal laws that allow for prison terms. Though a few of these laws specified administrative fines (Tajikistan) or were included in civil/administrative

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10 Global Blasphemy Laws Table **<www.ibanet.org/document?id=Global-Blasphemy-Laws-Table>** accessed 11 April 2023. For the purpose of this study, criminal and civil laws on blasphemy, apostasy, heresy and defamation of religion have been examined in 195 countries. This is not an exhaustive study of all laws that do not explicitly prohibit blasphemy, apostasy, heresy and defamation of religion. Broadly framed laws on public order or media regulation, for instance, are often used to quell journalistic speech considered blasphemous.

11 See Global Blasphemy Laws Table **<www.ibanet.org/document?id=Global-Blasphemy-Laws-Table>**. A 2020 report released by the United States Commission on International Religious Freedom found that there were 84 states which had criminal laws on blasphemy. See United States Commission on International Religious Freedom, 'Violating Rights: Enforcing the World's Blasphemy Laws', 2020, **<www.uscirf.gov/sites/default/files/2020%20Blasphemy%20Enforcement%20Report%20_final_0.pdf>** accessed 22 June 2021. In addition to the 84 states identified by the USCIRF report, our table includes the blasphemy laws of Bahamas, Belgium, Cambodia, Côte d'Ivoire, Fiji, Guatemala, Japan, Kiribati, Luxembourg, Monaco, Palestine, Portugal, Samoa, Solomon Islands, Tonga, Tuvalu and Uganda.

12 Algeria, Bahrain, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, South Sudan, Sudan, Syria, Tunisia, UAE and Yemen. Please refer to the Global Blasphemy Laws table for further information and the full citation. **<www.ibanet.org/document?id=Global-Blasphemy-Laws-Table>** accessed 11 April 2023.

13 Afghanistan, Bangladesh, Brunei, Cambodia, India, Indonesia and West Timor, Kazakhstan, Kyrgyzstan, Malaysia, Maldives, Myanmar, Nepal, Pakistan, Philippines, Russia, Singapore, Sri Lanka, Tajikistan, Thailand, Turkmenistan and Uzbekistan. Please refer to the Global Blasphemy Laws table for further information and the full citation. **<www.ibanet.org/document?id=Global-Blasphemy-Laws-Table>** accessed 11 April 2023.

14 Andorra, Austria, Belgium, Cyprus, Finland, Germany, Italy, Lichtenstein, Luxembourg, Moldova, Monaco, Montenegro, Poland, Portugal, San Marino, Spain, Switzerland, Turkey and Ukraine.

15 Kiribati, Papua New Guinea, Solomon Islands, Tuvalu and Vanuatu.

16 Botswana, Cameroon, Cape Verde, Comoros, Eritrea, Ethiopia, Gambia, Kenya, Malawi, Mauritania, Mauritius, Nigeria, Rwanda, Seychelles, Tanzania, Uganda, Zambia and Zimbabwe. Though South Africa has a common law offence against blasphemy, it is not included here as it is not codified and is not currently being used (the last known conviction was in 1968). Scholars have opined that it is likely that the common law offence has been abrogated by disuse or become unofficial due to unconstitutionality. See South Africa's (*End Blasphemy Laws*) **<https://end-blasphemy-laws.org/countries/africa-sub-saharan/south-africa> accessed 2 April 2023.**

17 Brazil, Guatemala, Guyana and Suriname.

18 Antigua and Barbuda, Bahamas, Grenada, Jamaica, Saint Lucia, Saint Vincent and the Grenadines and Trinidad and Tobago.

19 See *Burstyn v Wilson*, 343 U.S. 495, 505 (1952) (holding that a New York statute which permitted the banning of a film on the basis that it was 'sacrilegious' violated the First Amendment: 'it is enough to point out that the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views. It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures'). See E Aswad, R Hussain, M.A. Suleman, 'Why the United States Cannot Agree to Disagree on Blasphemy Laws', vol 32 (2014) *Boston University International Law Journal*, 130, referencing US states which still retain blasphemy laws. See also Dr. A Callamard, 'Expert meeting on the links between articles 19 and 20 of the ICCPR: Freedom of expression and advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence' (UNHCHR) 4.

legislation (Kyrgyzstan and Turkmenistan), they either have been or have the potential to be jointly applied with criminal offences.[20] At least four codified blasphemy laws impose the death penalty for this crime.[21]

In the last few years, people have been sentenced to death in countries such as Iran, Nigeria and Pakistan for this crime. For instance, Yahaya Sharif-Aminu, a Sufi musician, was convicted of blasphemy by a Sharia court for sharing audio messages on WhatsApp which were deemed to be blasphemous towards the Prophet. He was sentenced to death by the Sharia court, despite not having legal representation during the trial. His appeal to the Supreme Court, in which he has also challenged the validity of the blasphemy law in Kano state, remains pending.[22] In Pakistan, after a Christian woman named Asia Bibi was sentenced to death in 2010 (though she was eventually acquitted by the Supreme Court), two brothers, also Christian, were sentenced to death by hanging in 2018 for insulting the Prophet in articles and portraits posted on their website.[23]

1.2 International standards regarding free speech and blasphemy

The Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights (ICCPR) guarantee freedom of expression in Article 19.[24] After a controversial effort by some states to establish the principle that the 'defamation of religions' should be outlawed or even criminalised,[25] the application of the right to free expression to blasphemy laws is now very clear at the international level. According to the Human Rights Committee's 'General Comment No. 34' interpreting the scope of Article 19:

> 'Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances

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20 See United States Commission on International Religious Freedom, 'Violating Rights: Enforcing the World's Blasphemy Laws', 2020, p. 40. **<www.uscirf.gov/sites/default/files/2020%20Blasphemy%20Enforcement%20Report%20_final_0.pdf> accessed 22 June 2021.**

21 Humanists International 'Humanists at Risk: Action Report 2020', 2020, **<https://fot.humanists.international/general-introduction>** accessed 6 May 2022 ('Of these countries with "blasphemy"-type restrictions, 43 allow for a prison term for this crime. The crime of "blasphemy" is punishable by death in a further 6 countries: Afghanistan, Iran, Nigeria, Pakistan, Saudi Arabia and Somalia. In addition, most of the twelve countries which punish "apostasy" with death also sometimes treat "blasphemy" as evidence of apostasy.'); US Commission on International Religious Freedom, 'Violating Rights: Enforcing the World's Blasphemy Laws', 2020 ('Iran and Pakistan are the only two countries that explicitly enshrine the death penalty in law', but note that it is also carried out in Afghanistan and Saudi Arabia, as well as Brunei) **<www.uscirf.gov/sites/default/files/Blasphemy%20Laws%20Report.pdf>** accessed 6 May 2022; see also ABC, 'Travellers heading to Brunei could face death penalty now applying to blasphemy and gay sex' (4 April 2019) **<www.abc.net.au/news/2019-04-04/brunei-travellers-could-face-death-penalty-new-penal-code/10971880>** accessed 6 May 2022. See also section 1.3.5 on penalties below.

22 ADF International, 'Musician sentenced to death for blasphemy appeals to Nigerian Supreme Court' (14 November 2022) **<https://adfinternational.org/nigerian-musician-sentenced-to-death-for-blasphemy/#:~:text=Yahaya%20Sharif%2DAminu%2C%20a%20Nigerian,country's%20most%20egregious%20blasphemy%20laws>** accessed 2 April 2023.

23 See *The Guardian*, 'Asia Bibi: Pakistan court overturns blasphemy death sentence' (31 October 2018) **<www.theguardian.com/world/2018/oct/31/asia-bibi-verdict-pakistan-court-overturns-blasphemy-death-sentence>** accessed 16 June 2021; *The Telegraph*, 'Two Christian brothers sentenced to death for web blasphemy in Pakistan' (18 December 2018) **<www.telegraph.co.uk/news/2018/12/18/two-christian-brothers-sentenced-death-web-blasphemy-pakistan>** accessed 16 June 2021.

24 173 of the 195 UN countries have ratified the ICCPR. Of the 95 states with blasphemy laws, Bahrain, Maldives, Mauritania, Pakistan and Qatar entered reservations to Article 18 (which deals with the right to freedom of thought, conscience, and religion); Austria, Germany, Italy, Luxembourg and Pakistan entered reservations to Article 19; and Finland, Luxembourg, and Switzerland entered reservations to Article 20 (which requires the legal prohibition of propaganda for war as well as any 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence').

25 For over a decade beginning in the late 1990s, the Organization of Islamic Cooperation (OIC) pushed for the adoption of a number of contentious resolutions in the UN Human Rights Council and at the UN General Assembly that recognised the concept of 'defamation of religions' and sought to either prohibit or criminalise speech disrespectful of religion, originally with the stated purpose of addressing racism against Muslims in the West. Several countries, particularly Western nations, civil society organisations and UN experts consistently rejected the concept of defamation of religions and the resolutions that sought to entrench it. In 2011, a consensus was reached by way of the Human Rights Council's Resolution 16/18, which moved away from a legal prohibition regarding the defamation of religions and instead 'presents an action-oriented approach to combat religious intolerance through practical steps that states should take, such as enforcing anti-discrimination laws and speaking out against intolerance, while also protecting freedoms of speech and religion': see E Aswad, R Hussain, M.A. Suleman, 'Why the United States Cannot Agree to Disagree on Blasphemy Laws', vol 32 (2014) *Boston University International Law Journal*, 144-145.

envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.'[26]

In addition, under the 'Rabat Plan,' a codification of relevant standards supported by the UN High Commissioner of Human Rights:

'Blasphemy laws are counterproductive ...the right to freedom of religion or belief, as enshrined in relevant international legal standards, does not include the right to have a religion or a belief that is free from criticism or ridicule.'[27]

The Beirut Declaration on Faith for Rights, issued by faith-based and civil society actors and supported by the UN Office of the High Commissioner of Human Rights, includes a commitment to not oppress critical voices and views on matters of religion or belief, 'however wrong or offensive they may be perceived'. Its 18 commitments also echo the Rabat Plan and:

'[U]rges states that still have anti-blasphemy or anti-apostasy laws to repeal them, since such laws have a stifling impact on the enjoyment of freedom of thought, conscience, religion or belief as well as on healthy dialogue and debate about religious issues.'[28]

Freedom of expression is also protected in Article 10 of the European Convention on Human Rights (ECHR),[29] Article 13 of the American Convention on Human Rights[30] and Article 9 of the African Charter on Human and Peoples' Rights.[31]

In addition, the Council of Europe and the European Parliamentary Assembly have taken a firm stance in support of the abolition of blasphemy laws.[32] The Venice Commission, an expert body that forms part of the Council of Europe, has opined that criminal sanctions are inappropriate for blasphemy laws and advocated for the abolition of blasphemy laws in European states.[33] In 2013, in the 'EU Guidelines on the promotion and protection of freedom of religion or belief', the European Union announced that it will 'at all appropriate occasions' advocate the position:

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26 HRC General Comment No. 34, *Article 19, Right to freedom of speech and expression*, 12 September 2011.

27 See Office of the High Commissioner for Human Rights, 'The Rabat Plan of Action' 2012 **<www.ohchr.org/en/issues/freedomopinion/articles19-20/pages/index.aspx>** accessed 6 May 2022.

28 Office of the High Commissioner for Human Rights, 'Beirut Declaration on "Faith for Rights"', 2017 **<www.ohchr.org/Documents/Press/Faith4Rights.pdf>** accessed 6 May 2022.

29 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art 10.

30 Organization of American States (OAS), *American Convention on Human Rights, 'Pact of San Jose'*, Costa Rica, 22 November 1969.

31 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter) Art 9.

32 Parliamentary Assembly Recommendation 1805 (2007) on 'Blasphemy, religious insults and hate speech against persons on grounds of their religion', adopted on 29 June 2007 (27th Sitting); and Parliamentary Assembly Resolution 1510 (2006) on 'Freedom of expression and respect for religious beliefs', adopted during Assembly debate on 28 June 2006 (19th Sitting).

33 The Venice Commission states: 'criminal sanctions are inappropriate in respect of insult to religious feelings and, even more so, in respect of blasphemy'. Venice Commission Study 406/2006 on Blasphemy, Religious Insults and Incitement to Religious Hatred, adopted at the Commission's 70th Plenary Session, 16-17 March 2007 at para. 89(c) (this study is included in Venice Commission, Science and Technique of Democracy, No. 47: Blasphemy, Insult and Hatred – Finding Answers in a Democratic Society (Strasbourg: Council of Europe Publishing, 2010).

> 'that laws that criminalize blasphemy restrict expression concerning religious or other beliefs; that they are often applied so as to persecute, mistreat, or intimidate persons belonging to religious or other minorities, and that they can have a serious inhibiting effect on freedom of expression and on freedom of religion or belief; and recommend the decriminalisation of such offences.'[34]

While these international and regional human rights standards are phrased in similar terms, the jurisprudence interpreting them has not always provided the same level of protection to speech in the blasphemy context. For instance, although the European Court of Human Rights has rarely permitted criminal penalties for other speeches, the Court has allowed that criminal penalties for blasphemy and such laws are not considered incompatible with the right to free expression as a matter of principle.[35] And while the European Court has imposed stringent requirements for restricting political speech, it also allows a wide margin of appreciation for speech which offends religion:

> 'Whereas there is little scope ... for restrictions on political speech or on debate of questions of public interest, a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion.'[36]

This includes a highly controversial decision in which the European Court approved a criminal conviction for blasphemy in Austria.[37]

Other regional human rights approaches to limiting free speech also differ. Although the ASEAN Human Rights Declaration protects freedom of expression, unlike the ICCPR, the Declaration states that 'realization of human rights must be considered in the regional and national context' and it explicitly refers to 'religious backgrounds' as such a consideration.[38] Similarly, although Article 32 of the Arab Charter protects freedom of expression, the same provision provides that this right 'shall be exercised in conformity with the fundamental values of society'.[39] The African Charter protects the right of every individual to express and disseminate opinions 'within the law'[40], which the African Commission on Human and Peoples' Rights has interpreted to mean that the domestic laws which restrict free speech have to be in compliance with constitutional provisions and international human

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34 European Union Guidelines on the Promotion and Protection of Freedom of Religion or Belief (adopted by the Foreign Affairs Council Meeting, Luxembourg, 24 June 2013).

35 See, eg, ECtHR (C), *E.S. v Austria* (App. no. 38450/12), 25 October 2018, where the European Court considered that no violation of Article 10 had taken place where E.S. was convicted and fined 480 Euros for 'disparaging religious doctrines' during a right-wing seminar in which she stated, referring to the Prophet's marriage to his underage wife, Aisha, '[a] 56-year-old and a six-year-old? What do you call that? Give me an example? What do we call it, if it is not paedophilia?' The Court held the case involved 'weighing up the conflicting interests of the exercise of two fundamental freedoms', namely the right to free speech and freedom of religion, and that, where the speech was an 'abusive attack on the Prophet of Islam... capable of stirring up prejudice and putting at risk religious peace', its restriction 'corresponded to a pressing social need and was proportionate to the legitimate aim pursued', particularly where the fine was only 'moderate': §§46, 56-58.

36 ECtHR, *Wingrove v The United Kingdom* (App. no 17419/90), 25 November 1996.

37 See Can Yeginsu and John Williams, 'Criminalizing Speech to Protect Religious Peace? The ECtHR Ruling in E.S. v. Austria' (Just Security, 28 November 2018) <www.justsecurity.org/61642/criminalizing-speech-protect-religious-peace-ecthr-ruling-e-s-v-austria> accessed 6 May 2022. See also footnote no. 26 above.

38 Asean Declaration of Human Rights, ASEAN Secretariat, February 2013, (AHRD) Art 7. See also Articles 2(2)(a) and 2(2)(e) of the ASEAN Charter.

39 Arab Charter on Human Rights (adopted on 15 September 1994, entered into force in March 2008) reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005) (Arab Charter); see also Lyombe Eko, 'Legal Interpretations of Freedom of Expression and Blasphemy' (2018) *Oxford Research Encyclopaedia of Communication*, 17.

40 African Charter, Art 9(2).

rights standards.[41]

1.3 Testing blasphemy laws against permissible restrictions to speech

As explained above, international standards are clear on the fact that blasphemy laws are incompatible with freedom of speech guaranteed under Article 19 of the ICCPR, unless they *only* penalise advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence as set out in Article 20(2).

In addition, specific aspects of these laws may violate international law.

The international human rights law provides that any restriction on Article 19(1) of the ICCPR must be (i) provided by a clear and accessible law, (ii) necessary and legitimate to protect the rights or reputation of others, national security or public order, public health or morals, and (iii) the least restrictive and proportionate limit on the right means to achieve the aim.[42]

1.3.1 Clear and accessible law

1.3.1.1 There must be 'law'

General Comment No. 34 states that for a norm to be characterised as a 'law', it 'must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public'. [43]

Legislation emerges from democratic or other deliberations. Codified law may limit arbitrariness and whimsiness in restrictions to speech. Blasphemy still exists as a common law crime in South Africa, though it may be unenforceable on the basis of the new constitutional protections for free speech. The Supreme Court of Appeal of South Africa held that the Constitution only speech established 'advocacy of hatred that constitutes incitement to cause harm beyond the four stated grounds of race, ethnicity, gender or religion'.[44]

1.3.1.2 Vagueness

This means that a criminal offence in particular may not be ambiguous. The Human Rights Committee refers in General Comment No. 34 to the importance of precision and certainty in the process of drafting to ensure (1) that individuals are informed about what behaviour is prohibited and how to adhere to the law; and significantly (2) that the law does not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.[45] Therefore, any laws which do not conform to this specification would be considered vague and impermissible under the ICCPR standard. However, many blasphemy laws suffer from being vague by failing to demarcate precisely what behaviour is to be prohibited and therefore allowing excess discretion to authorities.

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41 African Commission on Human and Peoples' Rights, Communication No. 102/93, *Constitutional Rights Project v Nigeria.*

42 General Assembly, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* (UN Doc A/74/486) (9 October 2019), §21.

43 HRC General Comment No. 34, *Article 19, Freedom of opinion and expression*, 12 September 2011.

44 *Qwelane v South African Human Rights Commission* [2019] ZASCA 167

45 HRC General Comment No. 34, *Article 19, Freedom of opinion and expression*, 12 September 2011, §25.

This includes the blasphemy laws in India[46] and Egypt.[47]

1.3.1.3 Overbreadth

An overbroad law is one which encompasses both speech that may be validly prohibited and speech that may not be limited. Such laws have a particular capacity to chill speech as journalists cannot know what conduct will attract criminal sanction.

Examples of criminal laws that are overbroad include those penalising 'contempt of heavenly religions', 'outraging religious feelings', 'promoting one's own individual opinion on issues that are in disagreement among Islamic scholars', 'inciting people to disputes' and 'talking about religions other than Islam'.[48]

Similarly, blasphemy laws in Algeria punish anyone who 'produces, stores or distributes printed documents or films, or any other medium or means, to shake the faith of a Muslim'.[49] The Algerian provision is so broadly worded that even if a journalist wished to report news that could 'shake the faith of a Muslim' and have the proposition tested in court, they would find it difficult to distribute the news report as other intermediaries would also be directly liable. In 2015, an editor in Algeria was convicted of blasphemy for being the editor of a newspaper which published an article implying that the Prophet was educated, contradicting the widespread view of him as the 'illiterate prophet'.[50]

Laws like these also give too much discretion to the arresting authorities, prosecutors and judges to subjectively determine what conduct warrants criminal sanction. An overbroad law also denies a defendant the ability to have her case dismissed at an early stage on the basis that the law does not apply to her case. Her right to a short trial, as General Comment No. 34 articulates, is impacted. For instance, the average time an Indian criminal case generally takes in the lower courts is an estimated six years; the threat of a long and expensive criminal trial has an intense chilling effect.[51]

The doctrines of overbreadth and the resulting chilling effect on speech were used by the Supreme Court of India to strike down a speech law for the first time in 2015. The constitutional validity of a provision of the Information Technology Act 2000 was under challenge before the Supreme Court, which, at its lowest threshold, criminalised online speech that was 'annoying or inconvenient'. At the beginning of the hearing, government lawyers handed over various printouts of online images that were allegedly blasphemous and targeting various religions, as justification for the provision. Journalism was frequently targeted under the provision. However, citing the ICCPR and the UN Special Rapporteur on free speech – among other international human rights instruments – the Court struck down this provision as violating the Indian Constitution's free speech guarantee, on the

46 Indian Penal Code 1860, s 298, which makes it a criminal offence to utter or make any word, sound or gesture 'with the deliberate intention of wounding the religious feelings of any person', without defining the scope of the term 'religious feelings'.

47 Egyptian Penal Code, s 98(f), criminalises the use of religion to propagate 'extremist ideologies with the aim of instigating sedition and division or disdaining and contempting any of the heavenly religions or the sects belonging thereto, or prejudicing national unity or social peace'.

48 Amal Clooney and Philippa Webb, 'The Right to Insult in International Law', *Columbia Human Rights Law Review* 48, no. 2 (2017): 1-55 citing Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 51, UN Doc. A/67/357 (7 September 2012).

49 Ordinance No. 06-03 of Algeria 2006, Art 11.

50 CPJ, 'In Algeria, editor sentenced to three years on blasphemy charges' (16 March 2016) **<https://cpj.org/2015/03/in-algeria-editor-sentenced-to-three-years-on-blas>** accessed 15 January 2021.

51 Arunav Kaul, Ahmed Pathan, Harish Narasappa, 'Deconstructing Delay: Analyses of Data from High Courts and Subordinate Courts', in Approaches to Justice in India, Daksh, 2018, **<www.dakshindia.org/Daksh_Justice_in_India/03_title_page.xhtml>** accessed 5 May 2022.

grounds of 'inexactitude', overbreadth and the resultant chilling effect on free speech.[52]

1.3.2 Necessary for a legitimate aim

The list of legitimate aims that can be invoked to restrict speech in international treaties are exhaustive,[53] and therefore any restriction placed upon the freedom of expression must be necessary to secure one of those aims, as well as proportionate to the need for the restriction.[54] The reasons given by the state to justify the restriction must be 'relevant and sufficient'. Aims which are permissible under Article 19 of the ICCPR are (a) for respect of the rights or reputations of others, (b) for the protection of national security or of public order (ordre public), or (c) for the protection of public health or morals.

An additional permissible ground under Article 20 is to prevent incitement of religious hatred.

Nevertheless, many states punish criticism of religion or the spread of secular ideology.[55] For instance, in 2017, a journalist and secular activist Abdul Aziz Abdullah al-Qenaei was convicted by a Kuwaiti court for 'contempt of Islam' and 'slander of sharia' for comments he made on a programme aired by Al-Jazeera. He was originally sentenced to six months' imprisonment with labour, though this was reduced by four months on appeal.[56]

Although governments often seek to justify blasphemy laws on the ground of 'public order', some international bodies have found that the link between the law and incitement to public disorder is too remote.[57] For example, in *Aydin Tatlav v Turkey,* the applicant had criticised Islam for endorsing social injustices and was convicted of the offence of 'desecrating a religion'. The Court found that there was a violation of the right to freedom of speech as 'a pressing social need', which made it possible to consider that the interference examined as proportionate was not demonstrated in this case.[58]

1.3.3 Causation between speech and risk of harm

General Comment No. 34 provides a 'direct and immediate' proximity test for all restrictions to speech:

> 'When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct

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52 *Shreya Singhal v Union of India*, (2015) 5 SCC 1, §90.

53 See HRC, General Comment No. 34 (2011), §22: 'Restrictions are not allowed on grounds not specified in paragraph 3, even if such grounds would justify restrictions to other rights protected in the Covenant.'

54 See, eg, HRC, General Comment No. 34; ECtHR, *Lingens v Austria*, 8 July 1986, (App. No. 9815/82), §39-40. See also Dr. A Callamard, 'Expert meeting on the links between articles 19 and 20 of the ICCPR: Freedom of expression and advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence' (UNHCHR) 5.

55 General Comment No. 22, HRC General Comment No. 22, *Article 2, The right to freedom of thought, conscience and religion*, 30 July 1993, §2.

56 US Department of State, '2018 Report on International Religious Freedom: Kuwait', **<www.state.gov/reports/2018-report-on-international-religious-freedom/kuwait>** accessed 11 April 2023.

57 ECtHR, *Klein v Slovakia* (App. no. 72208/01), 31 October 2006, §54, where the court stated that 'the interference with his right to freedom of expression therefore neither corresponded to a pressing social need, nor was it proportionate to the legitimate aim pursued. It thus was not "necessary in a democratic society"'.

58 ECtHR, *Aydın Tatlav v Turkey* (App. no. 50692/99) 2 May 2006.

and immediate connection between the expression and the threat.'[59]

While interpreting whether a restriction on speech is necessary, the European Convention on Human Rights also requires a nexus between the speech and risk of harm.[60] The maintenance of public order is frequently cited as a basis for criminalising blasphemy. However, the causal link between the potential harm in blasphemy cases and the impugned speech is often violent conduct by those who *disagree* with, or are insulted by, the impugned speech. This potentially creates incentives for those who are insulted to express their displeasure by engaging in violence to silence those speakers that they disagree with, sometimes referred to as a 'heckler's veto'.[61]

1.3.4 Intent

International and regional human rights bodies frequently consider a speaker's intention to blaspheme as a relevant factor in their assessment of the legitimacy of penalising their speech.[62]

The inclusion of *mens rea* in the ingredients of an offence reflects an underlying idea that unless a harm is caused advertently, or at least negligently, it is improper to attach criminal sanctions.[63] However, states' blasphemy laws (such as in South Sudan[64]) do not always incorporate an intent requirement, and even when they do, the level of intent required differs across states and may be very low even in a criminal context.

In the UK, the House of Lords (as it then was) ruled that a defendant should have intended to publish the impugned blasphemous material; it was deemed sufficient for the prosecution to prove that the publication was intentional and the matter was blasphemous in its nature.[65]

Some states require a high standard of intent to be proven to constitute the offence of blasphemy. For instance, Bangladesh, Myanmar, India and Sri Lanka require '[d]eliberate and malicious acts intended to outrage religious feelings'.[66] However, many jurisdictions make blasphemy a strict liability offence, punishing the mere utterance of words that could be considered blasphemous. One of the more egregious examples of this is blasphemy laws in Iran, which punish any disparaging remarks made against the Prophet by death under certain circumstances. The law does not require any specific intent on the part of the speaker, only that the words spoken 'insult' the 'sacred values of Islam', 'any of the imams' or the Prophet. [67]

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59 HRC General Comment No. 34, *Article 14, Freedom of opinion and expression*, 12 September 2011, §35.

60 Toby Mendel, 'Restricting Freedom of Expression: Standards and Principles', Centre for Law and Democracy **<www.law-democracy.org/wp-content/uploads/2010/07/10.03.Paper-on-Restrictions-on-FOE.pdf>** accessed 15 January 2021.

61 E Aswad, R Hussain, MA Suleman, 'Why the United States Cannot Agree to Disagree on Blasphemy Laws', vol 32 (2014) *Boston University International Law Journal*, 141-142.

62 See, eg, ECtHR (GC), *Guja v Moldova* (App no. 14277/04), 12 February 2008, §77; ECtHR (GC) *Jersild v Denmar*k (App. no. 15890/89), 23 September 1994, §33.

63 Winnie Chan and A.P. Simester 'Four functions of mens rea' (2011) 70 CLJ 381.

64 Penal Code of South Sudan 2008, s 201, which punishes a person who 'publicly insults or seeks to incite contempt of any religion in such a manner as to be likely to lead to a breach of the peace', without requiring any intent on the part of the speaker to insult or breach the peace.

65 *Whitehouse v Lemon* [1979] 2 WLR 281; *R v Gay News Ltd* [1979] 1 All ER 898.

66 This provision can be found in the penal codes of Bangladesh, Myanmar, India and Sri Lanka.

67 Islamic Penal Code of Iran 1991, Art 513: 'Anyone who insults the sacred values of Islam or any of the Great Prophets or [twelve] Shi'ite Imams or the Holy Fatima... shall be executed, if considered to be Sāb ul-nabi [a person who swears at the Prophet]; otherwise, they shall be sentenced to one to five years' imprisonment.' A similar offence is included in Art. 262. As per Article 263, when the accused of sabb-e nabi (swearing at the Prophet) claims that his/her statements were uttered under coercion, as a mistake, in a state of drunkenness, anger or slip of the tongue, without paying attention to the meaning of the words, or quoting someone else, then s/he shall not be considered as Sāb ul-nabi [a person who swears at the Prophet].

1.3.5 Penalties

1.3.5.1 Criminal penalties

The penalties prescribed in a law must be proportionate to the aim of the law and under international law, criminal penalties are very rarely permissible for speech.[68] Punishments for blasphemy include the death sentence, lashes, other corporal punishment, life imprisonment, imprisonment, fines or even manual labour.

The death penalty is a prescribed punishment for blasphemy and related offences in the codified laws in Brunei[69], Iran,[70] Pakistan[71] and Mauritania[72] which prescribe the death penalty for blasphemy. In Iraq, the death penalty is prescribed for the offence of promoting or acclaiming Zionist principles, including freemasonry.[73] Previous interpretation of the Sharia law by Saudi Arabian judges has found blasphemy against Salafism or the Saudi monarchy to be punishable by death.[74] In Nigeria, the death penalty is prescribed by the Sharia law in certain states.

In addition, there are at least ten countries in which 'apostasy' is punishable with death in whole or in part of the country, often through the application of the uncodified Sharia law – Afghanistan, Iran, Malaysia, Maldives, Mauritania, Nigeria, Qatar, Saudi Arabia, United Arab Emirates, and Yemen.[75] Most of the countries which punish 'apostasy' with death also sometimes treat 'blasphemy' as evidence of apostasy.[76] Most blasphemy laws are embedded in criminal codes and prescribe imprisonment for convicted offenders.

> The use of harsh penalties creates a chilling effect on journalism. For instance, in Saudi Arabia, Raif Badawi, a blogger, was convicted of 'insulting Islam through electronic channels' as a result of his online advocacy for a separation between religion and the state and questioning the Kingdom's male guardianship system.[77] He was sentenced in 2013 to seven years' imprisonment and 600 lashes on charges of defamation of religion in Saudi Arabia.[78] The sentence was increased on appeal in May 2014 to ten years' imprisonment, 1,000 lashes and a fine of one million Saudi riyals (approximately US$267,000). He was released in March 2022, but he is still subject to a ten-year ban on travel and media activity which began after his release.[79]

68 See, eg, HRC, General Comment No. 34, §§34 - 35; ECtHR, *Guja v Moldova*, (Application no. 14277/04) 12 February 2008 §78; IACtHR, *Palamara-Iribarne v Chile* (Series C No. 135), 22 November 2005, §85; African Court on Human and Peoples' Rights, *Lohé Issa Konaté v Burkina Faso* (App. no. 004/2013), 5 December 2014, §145.

69 Brunei Syariah Penal Code 2013, Art 112.

70 Book Five of the Islamic Penal Code of the Islamic Republic of Iran 1991, Art 513.

71 Pakistani Penal Code, 1860, s 295-C.

72 Article 306, Criminal Code of Mauritania, 1984.

73 Iraqi Penal Code, 1969, Art 201.

74 United States Commission on International Religious Freedom, 'Violating Rights: Enforcing the World's Blasphemy Laws', 2020, p. 78, **<www.uscirf.gov/sites/default/files/2020%20Blasphemy%20Enforcement%20Report%20_final_0.pdf>** accessed 22 June 2021.

75 Humanists International, 'The Freedom of Thought Report' (2020) **<https://fot.humanists.international/general-introduction>** accessed 25 June 2021.

76 International Humanists and Ethical Union, 'The Freedom of Thought Report – 2017' **<www.skeptical-science.com/people/2017-freedom-of-thought-report>** accessed 24 June 2021.

77 Committee to Protect Journalists, 'Raif Badawi' **<https://cpj.org/data/people/raif-badawi>** accessed 15 January 2021.

78 Committee to Protect Journalists, 'Raif Badawi' **<https://cpj.org/data/people/raif-badawi>** accessed 15 January 2021.

79 'Saudi supreme court upholds verdict against blogger Raif Badawi', (*The Guardian*, 7 June 2015) **<www.theguardian.com/world/2015/jun/07/saudi-supreme-court-upholds-raif-badawi-blogger-verdict>** accessed 15 January 2021; 'Raif Badawi: Saudi blogger freed after decade in prison', (BBC, 11 March 2022) **<www.bbc.com/news/world-middle-east-60714086>**; Ifex, 'One year after his release from prison, blogger Raif Badawi is still not free' (14 March 2023) **<https://ifex.org/saudi-arabia-one-year-after-his-release-from-prison-blogger-raif-badawi-is-still-not-free>** accessed 10 April 2023.

Harsh penalties are particularly egregious for vague and overbroad blasphemy laws, which make it difficult to tell what speech would be regarded as blasphemous. In 2003, the Supreme Court of Afghanistan sentenced two journalists to death. They were accused of blasphemy for saying that the Islam practised in Afghanistan was reactionary and for criticising the political use of religion by conservative leaders. Their article posed the question 'If Islam is the last and most complete of the revealed religions, why do the Muslim countries lag behind the modern world?'[80] Similarly in 2005, another journalist in Afghanistan, the editor of a magazine called *Haqoq-e-Zaan*, was convicted for blasphemy and sentenced to two years' imprisonment for reprinting articles criticising stoning and corporal punishment.[81]

1.3.5.2 Civil penalties

At least 11 countries impose civil penalties for the offence of blasphemy.[82] Most of these states, including countries such as Russia[83], the Bahamas[84] and Italy[85] have both civil and criminal penalties. The civil penalties are mostly in the nature of fines, but in some states, 'civil' laws include sanctions like compulsory labour, community service,[86] confiscation and destruction of the blasphemous material.[87]

In addition, the media laws of states can also be used to punish offenders and stop the propagation of any material which may be considered blasphemous. For example, in Lesotho, the telecommunications authority prohibits the broadcasting of content which may amount to blasphemy. Failure to comply with this provision may result in a fine, the issuance of a correction or an apology, or both.[88] Similarly, the Mass Media Act of Slovenia also forbids the use of content which may 'give offence on the grounds of religious or political beliefs' in advertising, punishable with a fine.[89] With no concrete definition of what can amount to blasphemy or offensive content, these sanctions are vague and overbroad, leaving the state with discretion to decide what is proscribed.

1.4 Equality and non-discrimination

The right of equality and non-discrimination must be read along with the right to free expression, as these are cross-cutting guarantees with respect to all rights under the ICCPR including the freedom of expression and religion.[90] States are therefore explicitly precluded from denying ethnic/religious/linguistic minorities their 'right, in community with the other members of their group, to

80 Reporters Without Borders, 'Supreme court confirms death sentence for two journalists for blasphemy' (RSF, 20 Jan 2016) <https://rsf.org/en/news/supreme-court-confirms-death-sentence-two-journalists-blasphemy> accessed 15 January 2021; see also Reporters Without Borders, 'Annual Report 2004' **<www.refworld.org/docid/46e690f223.html>** accessed 23 June 2021. The reporters went into hiding after being released pending trial and were eventually offered asylum in a Western country with the assistance of the United Nations High Commissioner for Refugees.

81 Committee to Protect Journalists, 'Editor goes on trial for blasphemy' (CPJ, 11 Oct 2005) **<https://cpj.org/2005/10/editor-goes-on-trial-for-blasphemy.php>** accessed 15 January 2021.

82 Bahrain, Bahrain, Italy, Kyrgyzstan, Mauritius, Moldova, Russia, Switzerland, Tajikistan, Turkmenistan and Uzbekistan.

83 Criminal Code of the Russian Federation 1996, Art 148.

84 Penal Code of Bahamas, 1924, s 489; Printing of Papers and Books Act 1990, s 5.

85 Criminal Code of Italy, 1930, Art 403 and 404 (criminal penalties); Criminal Code of Italy, 1930, Art 724 (administrative penalty).

86 Contravention Code of Moldova, Art 54(5).

87 Examples are Russia (Art. 148, Criminal Code of the Russian Federation, 1996); Republic of Moldova (Art. 54, Contravention Code of Moldova, 2008); and Kuwait (Art. 19, Press and Publication Act, 2006).

88 Lesotho Telecommunications Authority (Broadcasting) Rules 2004, Rule 26.

89 Mass Media Act of Slovenia, Art 47.3.

90 ICCPR Art 2(1) and 26.

enjoy their own culture, to profess and practice their own religion, or to use their own language'.[91] And although states are not barred from establishing an official religion, their laws may not privilege the state religion in treatment or discriminate against other religions or beliefs.[92] General Comment No. 22 on the freedom of religion, guaranteed in Article 18 of the ICCPR, confirms this and is clear that 'Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief'.[93]

However, at the time of publication, many countries in the world still punish blasphemy against a single religion, generally the state religion. For instance, the 1962 Thai Sangha Act criminalises '[a] ny person who imputes the Sangha or other Sangha, which may be injurious to the reputation or create disharmony', thereby criminalising only defamation of Buddhism and Buddhist clerics.[94] Several states have specific provisions to punish members of certain religions or communities for the commission of blasphemy. The Ahmadi community in Pakistan, for instance, is specifically punished for certain 'blasphemous' acts, which are considered such if committed by the members of that community.[95] In Brunei, the law contains specific blasphemy offences applicable only to non-Muslims.[96]

Conversely, some states also target all communities, except a certain (often majority) community. In such cases, certain behaviours would only be allowed for the members of a specific community and would be considered blasphemous for all other communities.

For instance, the blasphemy provision of Myanmar's Penal Code has been used to entrench the dominance of Buddhism in Myanmar.[97] The sanction of two years' imprisonment for 'outraging religious feelings' has frequently been used against religious minorities and individuals speaking out against extremism.[98] The UN Special Rapporteur on the freedom of religion or belief has noted that such forms of aggravated discrimination, which penalise blasphemy only against one particular religion, tend to intensify when a 'State itself officially adopts the religion of the majority or of the ethnically dominant minority, or subscribes to a particular ideology'.[99]

Any blasphemy law that discriminates between certain religions and believers and other religions or non-believers therefore goes against international human rights standards. The criminalisation of the advocacy of atheist or non-theist beliefs may also result in sanctions against journalists who may speak of scientific beliefs that conflict with religious tenets or touch upon other secular enquiries.

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91 ICCPR Art 7.

92 Commission on Human Rights, Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, UN Doc. E/CN.4/1996/95/ ADD.1, §81 (9 February 1996).

93 HRC General Comment No. 22, *Article 2, The right to freedom of thought, conscience and religion*, 30 July 1993, §2.

94 The Sangha Act B.E 2505 [1962], Section 44 ter.

95 Pakistani Penal Code, s 298C, 'Any person of the Quadiani group or the Lahori group (who call themselves 'Ahmadis' or by any other name) who, directly or indirectly, poses himself as a Muslim, or calls, or refers to, his faith as Islam, or preaches or propagates his faith, or invites others to accept his faith, by words, either spoken or written, or by visible representations, or in any manner whatsoever outrages the religious feelings of Muslims, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.'

96 Syariah Penal Code, 2013, s 221, 'Any non-Muslim who, orally, in writing, by visible representation or in any other manner contempts or brings into contempt Nabi Muhammad Sallallahu 'Alaihi Wa Sallam or any Nabi Allah'; Section 222 'Any non-Muslim who derides, mocks, mimics, ridicules or contempts, by word or deed, any verse of the Al-Qur'an or hadith of Nabi Muhammad Sallallahu 'Alaihi Wa Sallam'.

97 Myanmar Penal Code 1861, s 295A.

98 The Diplomat, 'Myanmar's Religious Hate Speech Law' (5 May 2016); see <https://thediplomat.com/2016/05/myanmars-religious-hate-speech-law> accessed 15 January 2021.

99 Human Rights Committee, *Waldman v Canada*, (Communication No. 694/1996), UN Doc. CCPR/C/67/D/694/1996 (5 November 1999).

For example, in Egypt, atheist activist and blogger Anas Hassan was arrested for blasphemy in 2019 and later sentenced to three years' imprisonment and a fine for managing 'The Egyptian Atheists' Facebook page which published atheist ideas.[100] The sentence was upheld by an appeals court in 2020.[101] In Indonesia, former civil servant Alexander Aan was sentenced to imprisonment for two and a half years for identifying himself as an atheist on Facebook and posting 'God doesn't exist'.[102] In Kazakhstan, human rights activist Alexander Kharlamov was charged under the blasphemy provision in 2012 due to publications which expressed doubt about God.[103] The charges were eventually dropped, but not before Kharlamov had been forced to spend a month in forced psychiatric evaluation.[104]

1.5 Defences

1.5.1 Available defences

When accused of blasphemy, journalists may argue that some of the defences available for defamation must also be available to them in blasphemy cases. For instance, the Human Rights Committee has stated that defamation laws 'should not be applied' with regard to opinions, ie 'those forms of expression that are not, of their nature, subject to verification'.[105] It has also held that '[d]efamation laws ... in particular penal defamation laws, should include such defences as the defence of truth'[106] and that 'a public interest in the subject matter of the criticism should be recognized as a defence'.[107] Other international bodies have also recognised what amounts to defences of 'fair comment' and 'reasonable publication' or 'responsible journalism'.[108]

Some states such as the Bahamas[109] and Guyana[110] allow for 'expressing arguments in good faith and in decent language' as a defence when accused of 'blasphemous libel'. Similarly, before repeal in December 2018, 'blasphemous libel' was an offence under the Canadian Criminal Code and included 'good faith' and 'decent language' as defences.[111]

Further, in a number of states including the UK, if a publisher is able to establish that it acted responsibly in its attempt to verify the information on a matter of public interest, it can claim a safe harbour from liability for the defamatory statement published.[112] But states generally lack such

100 United States Department of State Office of International Religious Freedom, 'Egypt 2020 International Religious Freedoms Report' (2020) **<www.state.gov/wp-content/uploads/2021/05/240282-EGYPT-2020-INTERNATIONAL-RELIGIOUS-FREEDOM-REPORT.pdf>** accessed 23 June 2021.

101 Egyptian Initiative for Personal Rights, 'Economic Misdemeanour Appeals court upholds verdict against blogger, with 3 years imprisonment and a 300,000 EGP fine for managing the "Egyptian Atheists" Facebook page' (23 June 2020) **<https://eipr.org/en/press/2020/06/economic-misdemeanour-appeals-court-upholds-verdict-against-blogger-3-years>** accessed 7 April 2023.

102 See *The Guardian*, 'Indonesia's Atheists face battle for religious freedom', (3 May 2012) **<www.theguardian.com/world/2012/may/03/indonesia-atheists-religious-freedom-aan>** accessed 23 June 2021; *Jakarta Post*, 'Atheist Alexander Aan gets of prison' (31 January 2014) **<www.thejakartapost.com/news/2014/01/31/atheist-alexander-aan-gets-prison.html>** accessed 23 June 2021.

103 Article 164 of the Criminal Code of the Republic of Kazakhstan (adopted in 1997) – a similar offence is still in place under Article 174 of the updated Criminal Code adopted in 2014.

104 See United States Commission on International Religious Freedom, 'Violating Rights: Enforcing the World's Blasphemy Laws', 2020, [35]. **<www.uscirf.gov/sites/default/files/2020%20Blasphemy%20Enforcement%20Report%20_final_0.pdf>** accessed 22 June 2021.

105 HRC General Comment No. 34, *Article 19, Right to freedom of speech and expression*, 12 September 2011, §47.

106 HRC, General Comment No. 34 (2011), §47.

107 HRC, General comment No. 34 (2011), §47 (emphasis added); See, eg, ECtHR (GC), *Kącki v Poland* (App. no. 10947/11), 4 July 2017, §49.

108 ECtHR, *Bladet Tromsö and Stensaas v Norway* (App. no. 21980/93), 20 May 1999, §68; see also §72 noting the newspaper had acted in good faith.

109 Penal Code of Bahamas 1924, s 489.

110 Penal Code of Guyana 1893, Art 348.

111 Canadian Criminal Code 1985, s 296.

112 United Kingdom Defamation Act 2013, s 4.

exceptions to liability or criminal responsibility in the context of blasphemy.

1.5.2 The press – a 'public watchdog'

The ECtHR in *Jersild v Denmark* made a significant statement in this regard. In 1985, a Danish journalist conducted an interview of three members of a racist and xenophobic group which was aired on television. It contained several derogatory statements about racial minorities and immigrants in Denmark and throughout the world. Along with the group members who made the statements, the journalist who interviewed them, and head of the Danmarks Radio news section, were also prosecuted for aiding and abetting the group members. After being convicted by the Danish lower court, which ruling was affirmed by the appellate court, the case was heard by the ECtHR. The ECtHR emphasised the importance of the press as a 'public watchdog' and held that punishing a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest. 'Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them.'[113]

113 ECtHR, *Jersild v Denmark*, (Application No 15890/89), 23 September 1994, §31.

2. Overlap between hate speech and blasphemy

2.1 Analysing the link between religious hate speech and blasphemy

Laws against blasphemy seek to protect the sanctity of religious belief, and blasphemy is contextual to each religious or cult practice. These limits on speech don't meet the international human rights standards.

Religious hate speech against individual followers and groups of members is prohibited.[114] Blasphemous hate speech is a subset of religious hate speech. It is speech that appears to target a religious idea but in fact targets the followers of a religion. It's not always easy to separate blasphemy from blasphemous hate speech. The European Commission for Democracy through Law (Venice Commission) notes that even though the boundaries between blasphemy and hate speech may seem difficult to identify, emphasis must be placed on the incitement to hatred as the central factor rather than the disrespect to the religion.[115]

Article 20(2) of ICCPR obliges states to prohibit any advocacy of national, racial or *religious hatred* that constitutes incitement to discrimination, hostility or violence. Such restrictions placed must comply with Article 19(3) of ICCPR.[116] The Special Rapporteur on freedom of opinion and expression splits this into three key elements:

(i) First, only advocacy of hatred is covered;

(ii) Second, hatred must amount to advocacy which constitutes incitement, rather than incitement alone; and

(iii) Third, such incitement must lead to one of the listed results, namely discrimination, hostility or violence.[117]

Inclusion of the word 'hostility' in a prohibited result has been critiqued by a number of commentators as insufficiently protective of speech. After all, there is much to be said for allowing the ebbs and flows of likes and dislikes between communities, religious or otherwise. The formulation 'advocacy of ... religious hatred that leads to incitement of ... hostility', at its lowest threshold, however, is limited by the requirement that hostility must in fact have been incited. Advocacy of religious hostility that *could* incite hostility would only constitute an inchoate violation of the law. A prosecutor or private complainant would need to prove that the journalist in question *did* incite hostility.

The definition of hostility may raise the bar higher. 'Hostility' is a manifestation of hatred beyond a mere state of mind.[118] 'Hatred' is a state of mind characterised as intense and irrational emotions

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114 Human Rights Committee General Comment No. 34, Article 19: Freedom of opinion and expression, 12 September 2011, §50-52.

115 Venice Commission, *Blasphemy, Insult and Hatred: Finding Answers in a Democratic Society, Science and Technique of Democracy*, No. 47 (*Council of Europe*, 2010) **<www.venice.coe.int/webforms/documents/?pdf=CDL-STD(2010)047-e>** accessed 15 January 2021.

116 Human Rights Committee General Comment No. 34, Article 19: Freedom of opinion and expression, 12 September 2011, §50-52.

117 Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, General Assembly (UN Doc. A/67/357) (7 September 2012) (by Frank La Rue) [12].

118 Article 19, 'Towards an interpretation of article 20 of the ICCPR: thresholds for the prohibition of incitement to hatred: work in progress', study prepared for the regional expert meeting on Article 20 organised by the Office of the United Nations High Commissioner for Human Rights, held in Vienna on 8–9 February 2010. **<www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/CRP7Callamard.pdf>** accessed 26 April 2023.

of opprobrium, enmity and detestation towards the target group.[119] It is recommended that such incitement to hostility be prohibited by civil remedies since they aren't the most egregious forms of incitement to religious hatred. It would not be hard to obtain agreement – even by free speech 'absolutists' from the United States – that at the other end of the spectrum, incitement to violence should be criminalised.

There are numerous instances of blasphemous hate speech that aren't prosecuted because they appear to be blasphemy per se. In 2005, *Jyllands-Posten*, a Danish newspaper printed 12 cartoons depicting the Prophet. The headline printed along with these cartoons was '*Muhammeds ansigt*', which means 'The Face of Muhammad'. In addition to these drawings of the Prophet being correctly construed as blasphemy per se, a closer examination of these cartoons revealed that some of them could possibly also constitute hate speech.

Erik Bleich studied these 12 cartoons and interpreted each of them differently. Not all of the cartoons in fact portrayed the Prophet. Let us analyse one of these 12 images as possible hate speech: a cartoon that shows the Prophet wearing a turban drawn as a lit bomb. *Bleich* states that this cartoon implicates all Muslims and is not simply a criticism of a narrow portion of Islamic doctrine.[120] In this regard, *Bleich* writes,

> 'In my judgment, the most controversial images link Muhammad with violence, terrorism, and the oppression of women, in ways that involve little or no ambiguity and no attempt at humour or satire. The best-known cartoon in this vein shows Muhammad wearing a turban that constitutes a lit bomb. Although the cartoonist subsequently argued that he was simply criticizing Muslim fanatics and not all Muslims (Brinch 2006; Westergaard 2009), the depiction itself shows the bomb as the entirety of what is going on in Muhammad's head. Therefore, even if we accept the artist's (self-interested) statements about his intent, the effect of the image is likely to be quite different from the artist's stated goal.
>
> ....
>
> So legally, the crucial question is whether these cartoons constituted a criticism of doctrine, or an attack on Muslims as a group. Along with Tariq Modood, I have argued that depicting Muhammad as a violent terrorist, or as oppressive to women implicates all Muslims and is not simply a criticism of a narrow portion of Islamic doctrine.'[121]

The Danish authorities declined to prosecute anyone in this matter.[122] Data suggests that in some European countries, hate speech is underreported. Police officers in these countries have a low capacity to recognise hate speech crimes. Prosecutors in some countries appear to be hostile to the idea of prosecuting hate speech crimes.

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119 Article 19, 'Camden Principles on Freedom of Expression and Equality' (2009), principle 12.1. **<www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf>** accessed 6 May 2022. These definitions are cited with approval in the Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, General Assembly (UN Doc. A/67/357) (7 September 2012) (by Frank La Rue) [12].

120 Erik Bleich, 'Free Speech or Hate Speech? The Danish Cartoon Controversy in the European Legal Context' in Kavita R. Khory (ed), *Global Migration: Challenges in the Twenty-First Century* (Palgrave Macmillan, 2012).

121 Erik Bleich, 'Free Speech or Hate Speech? The Danish Cartoon Controversy in the European Legal Context' in Kavita R. Khory (ed), *Global Migration: Challenges in the Twenty-First Century* (Palgrave Macmillan, 2012).

122 Erik Bleich, 'Free Speech or Hate Speech? The Danish Cartoon Controversy in the European Legal Context' in Kavita R. Khory (ed), *Global Migration: Challenges in the Twenty-First Century* (Palgrave Macmillan, 2012).

In 2007, the controversy around the *Jyllands-Posten* cartoons came back to life when *Charlie Hebdo* reprinted these controversial cartoons of the Prophet.

Charlie Hebdo was sued for incitement to racism by two Islamic groups in France. The Paris criminal court's decision cleared Philippe Val, the editor of *Charlie Hebdo*. The lawsuit concerned three of the six Mohammed cartoons which *Charlie Hebdo* published in 2006. Two of the three had appeared in *Jyllands-Posten* in 2005. One of them was the cartoon showing Mohammed wearing a turban in the form of a bomb about to explode. The other showed him to a group of 'martyrs' saying: 'Stop, stop, we ran out of virgins'. The third showed Mohammed with his head in his hands saying: 'It is hard to be loved by idiots'.

The tribunal, while explaining its ruling regarding the drawing of Muhammad wearing a turban with a bomb, said, 'the drawing, taken on its own, could be interpreted as shocking for followers of this religion (Islam)'. However, it had to be seen in the wider context of the magazine examining the issue of religious fundamentalism. Therefore, even if the cartoon 'is shocking or hurtful to Muslims, there was no deliberate intention to offend them'.[123] The tribunal did however acknowledge that this cartoon was 'darker' than the others and, taken in isolation, constituted an actionable 'insult' by suggesting 'that terrorist violence is inherent in Islam'.[124] However, the context of the cartoons was taken into account in accordance with the French criminal law.[125]

These cartoons and the attack on *Charlie Hebdo* provoked some polarised reactions on how blasphemy should be dealt with, largely along the north-south global axis. General Comment No. 34 and the international law consensus that blasphemy has no place under international law has been criticised as not adequately addressing the fact that Article 19 allows speech to be limited for moral reasons; respect for their religion, the heart of public moralities of non-secular countries, may well allow for this.

> 'Insofar as the public moralities of these countries is concerned, unacceptable irreverence (blasphemy) may be as morally unsayable as hate speech or the "n-word" is in Western Europe or as Holocaust denial is in Germany. De facto then, in these countries, blasphemous speech *does* offend, in a unique way, against public morality.'[126]

This argument, however, fails to acknowledge that even if an anti-blasphemy law was passed for a legitimate aim, it could not be non-discriminatory and sufficiently precise at the same time. Merely as a practical matter, it would be impossible to codify into law all the ways all religions could be blasphemed against. And if it were, many of the legal provisions would contradict each other. Indeed, it is that aspect of blasphemy law which causes a freezing of religious dogma and an unacceptable and deep chilling effect on journalism.

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123 Gwladys Fouché, 'Editor cleared in French cartoons case' (*The Guardian*, 22 March 2007) **<www.theguardian.com/media/2007/mar/22/pressandpublishing.race>** accessed 15 January 2021.

124 Peter Noorlander, 'In Fear of Cartoons' (*Media Legal Defence Initiative*, 2015) **<www.mediadefence.org/wpcontent/uploads/2020/06/Noorlanderpp115122_2015_EHRLR_Issue_2_Print_FINAL.pdf>** accessed 15 January 2021.

125 Peter Noorlander, 'In Fear of Cartoons' (*Media Legal Defence Initiative*, 2015) **<www.mediadefence.org/wp-content/uploads/2020/06/Noorlanderpp115-122_2015_EHRLR_Issue_2_Print_FINAL.pdf>** accessed 15 January 2021.

126 N Cox, 'Justifying Blasphemy Laws: Freedom of Expression, Public Morals, and International Human Rights Law' (2020) 35 Journal of Law and Religion 33.

2.2 Guidance to prosecutors and judges

The Rabat Plan of Action suggests a high threshold for defining restrictions on freedom of expression and incitement to hatred, and for the application of Article 20 of the ICCPR. It outlines a six-part threshold test for prosecutors and judges to take into account:

(*1*) ***the social and political context***

(2) ***the status of the speaker***

In addition, the **status of the individual or religious group spoken of** may be relevant, whether they are religious minorities in the particular context or whether they have suffered historical discrimination; intersectional factors like race, colour, sex, language, political or other opinion, national or social origin, property, birth or other statuses are considered.

(*3*) ***intent to incite the audience against a target group***

With regard to blasphemy offences, such ***mens rea*** **should not merely be a lexical enquiry emerging from the statement** itself, but should also enquire into the facts and circumstances evidencing the subjective intent of the particular author of journalistic content.

(*4*) ***content and form of the speech***

(5) ***extent of its dissemination***

(6) ***likelihood of harm, including imminence***

In addition to the above points that emerge from the Rabat Action Plan, the following limits on prosecution for blasphemous hate speech are relevant:

(7) ***mandatory state sanction for prosecution***. Where the right against blasphemous hate speech exists, the inevitable large numbers of private criminal complaints are limited by the filter of state sanction or a threshold prosecutorial examination of the complaint before initiating criminal process.

(8) ***Arrest or any detention*** must require the permission of a judicial authority and not merely police or prosecutorial acquiescence.

(9) ***Onus on the state or the private complainant*** to demonstrate that the blasphemous speech for which an accused is being prosecuted is also religious hate speech and targets individuals and/or groups for their affiliation to the religion targeted.

(10) ***States have an affirmative obligation to prevent and punish violence.*** Prosecutors and police may be reminded that where offended individuals or mobs seek to react violently to speech that is or is perceived to be blasphemous speech, the onus is on the state to act against them and protect the journalist, whether or not the speech is legal.

(11) ***Criminal sanction and imprisonment should be employed only in the most extreme cases*** of religious hate speech. States should adopt civil laws, with the application of diverse remedies, including procedural remedies (for example, access to justice and ensuring effectiveness of domestic institutions) and substantive remedies (for example, reparations that are adequate, prompt,

and proportionate to the gravity of the expression, which may include restoring reputation, preventing recurrence, and providing financial compensation).

(12) ***Legal aid*** should be provided to journalists accused of blasphemous speech.

(13) ***Religious courts*** should follow the same requirements of legality and due process as any other court, with appeals to constitutional courts.

(14) ***Training police, prosecutors, and judges*** in these principles on an ongoing basis, and regular evaluations of compliance is recommended to help embed these principles in practise.

3. Damaging implementation of blasphemy laws: due process and fair trial concerns

The process for a defendant being charged, arrested and facing trial for blasphemy charges is often itself sufficient punishment to chill speech. In this section, we examine state practice with regard to due process in the use of blasphemy laws, including in religious courts. The emotive dangers of blasphemy trials in particular, including potential interference by non-state bodies like religious actors, are examined.

Recommendations concerning the overlap between blasphemy and hate speech will be considered by the High Level Panel of Legal Experts on Media Freedom in the report on hate speech.

3.1 Arbitrary arrest and detention

General Comment No. 35 of the Human Rights Committee on the 'Liberty and Security of a Person' provides that 'arrest or detention as punishment for the legitimate exercise of the rights as guaranteed by the Covenant is arbitrary, including freedom of opinion and expression'.[127] Although blasphemy laws are themselves inconsistent with human rights guarantees (unless they amount to speech that violates Article 20 of the ICCPR), they have also been applied in an arbitrary manner.[128] The UN's Working Group on Arbitrary Detention has, for instance, found that arrests and detentions under blasphemy laws are arbitrary.[129]

3.1.1 Judicial authorisation for arrests

Article 9 of the ICCPR recognises and seeks to protect the liberty and security of individuals.[130] Arrest within the meaning of Article 9 includes any deprivation of liberty at the pre-trial stage 'from the time when the police or the prosecuting magistrate first learns of the occurrence of a crime'.[131] The importance of safeguards from arbitrary detention during the pre-trial stage is highlighted by the ICCPR, and Article 9 requires that 'anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power'.[132] Grounds for arrest or detention must be prescribed by law and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application.[133] An arrest

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127 Human Rights Committee General comment No. 35, *Article 9, Liberty and security of person*, 16 December 2014, §17.

128 See section 1.3 on testing blasphemy laws against permissible restrictions to speech above. Human Rights Committee General Comment No. 34, *Article 19: Freedom of opinion and expression*, 12 September 2011, 12 [§48]; Human Rights Council, *Report of the Special Rapporteur on freedom of religion or belief* (UN Doc A/HRC/31/18) (23 December 2015), §12-16.

129 See, eg, WGAD opinion in the case of *Ayub Masih v Pakistan* (UN Doc. E/CN.4/2003/8/Add.1 at 22 (2001) **<www.refworld.org/docid/470b77ae0.html>** accessed 25 June 2021. See also Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development*, Opinions adopted by the WGAD, 2 March 2010, A/HRC/13/13/30 Add.1, Opinions adopted by the WGAD, 2 March 2010, A/HRC/13/13/30 Add.1, **<www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-30-Add1.pdf>** accessed 15 January 2021.

130 ICCPR, Art 9.

131 Dr. Ranier Grote, 'Protection of Individuals in the Pre-Trial Procedure' **<http://hrlibrary.umn.edu/fairtrial/wrtf-rg.htm>** accessed 15 January 2021.

132 ICCPR, Art 9(3).

133 See Human Rights Committee, *Concluding observations of the Human Rights Committee: The Philippines* (CCPR/CO/79/PHL) (1 December 2003) para. 14 (vagrancy law vague); Human Rights Committee, *Concluding observations of the Human Rights Committee: Mauritius* (CCPR/CO/83/MUS) (27 April 2005) para.12 (terrorism law); Human Rights Committee, *Concluding observations of the Human Rights Committee: Russian Federation* (CCPR/C/RUS/CO/6) (24 November 2009) para. 24 ('extremist activity'), and Human Rights Committee, *Concluding observations of the Human Rights Committee: Honduras* (CCPR/C/HND/CO/1) (13 December 2006) para. 13 ('unlawful association').

or detention may be authorised by domestic law and nonetheless be arbitrary.[134] 'Arbitrariness' must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of the law. This means that 'remand in custody must not only be lawful but reasonable and necessary in all the circumstances, for example to prevent flight, interference with evidence or the recurrence of crime'.[135] Such safeguards are critical in the case of arrests for blasphemy, since trials can often take years or even decades.

Several countries including Brunei, India, Myanmar, Pakistan and Sri Lanka treat blasphemy as a 'cognisable' offence, whereby an arrest can be made without a warrant from a judicial authority. The blasphemy provision in these states is often part of their common legal heritage from British colonialism, which had little interest in the benefits of free speech and great interest in law and order. However, colonial provisions against blasphemy have often been augmented by newer (and sometimes more stringent) prohibitions in some of these states and are zealously implemented by modern-day governments in contexts where extreme religiosity is prevalent. While this may amount to 'legal authorisation', such laws can lead to an over delegation of powers to the police, particularly where vague and overbroad laws allow junior ranking police officers to make arrests without any prior judicial assessment or approval at a senior level as to whether the offending act is in fact illegal.

The absence of safeguards has led to arbitrary arrests and detention of journalists. For instance, in 2014, an editor of a regional newspaper in India, Jitendra Das, was arrested in connection with the publication of a picture of the Prophet, for 'outraging religious feelings'.[136] It has been reported that when the arrest was questioned by the editorial staff, the police told them Das was only being arrested to diffuse tension, since protestors had gathered around the newspaper's office. The 'heckler's veto' here caused the journalist to suffer detention instead of those threatening unlawful action.[137]

Police detention can also result in a severe chilling effect given known travesties in jail and police custody in many states in which the 'inappropriate conditions of detention, including conditions characterized by structural deprivation and the non-fulfilment of rights necessary for a humane and dignified existence, amount to a systematic practice of inhuman or degrading treatment or punishment'.[138] Concerns raised by the lack of procedural safeguards available at the time of arrest are frequently exacerbated by the other procedural violations discussed below.

3.1.2 Arbitrary detention

The Working Group on Arbitrary Detention has observed in several cases that restrictions imposed on speech and expression should conform with international human rights standards, and that detention as a punishment for merely exercising freedom of speech and expression is arbitrary.[139] Since

134 Human Rights Committee General Comment No. 35, *Article 9, Liberty and security of person*, 16 December 2014, 3 [§12].

135 ECtHR, *Gorji-Dinka v Cameroon* (Application No. 1134/2002), §5.1. See also ECtHR, Van Alphen v Netherlands, (Application No. 305/1988), §5.8. See also Human Rights Committee General Comment No. 35, *Article 9, Liberty and security of person*, 16 December 2014, 3 §12.

136 Reporters Without Borders, 'Publication of Mohamed picture triggers riots, journalist's arrest' (16 January 2014) <https://rsf.org/en/news/publication-mohamed-picture-triggers-riots-journalists-arrest> accessed 15 January 2021; *Hindustan Times*, 'Newspaper office attacked, journo held for publishing Prophet's photo' (15 January 2014) **<www.hindustantimes.com/india/newspaper-office-attacked-journo-held-for-publishing-prophet-s-photo/story-KyS3PXfXJC3nCu8yE3565L.html>** accessed 24 June 2021.

137 See section 1.3.3 on causation between speech and risk of harm above.

138 United Nations General Assembly, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* (UN Doc A/68/295) (9 August 2013).

139 HRC, *Manouchehr Karimzadeh v Iran*, Working Group on Arbitrary Detention, Opinion No. 28/1994 (29 September 1994); HRC, *Mr. Abdul Kareem Nabil Suliman Amer v Egypt*, Working Group on Arbitrary Detention, Opinion No. 35/2008 (6 December 2007).

blasphemy laws not limited to the hate speech that contravenes Article 20 of the ICCPR are always considered to be arbitrary under international law, any detention under such laws would be arbitrary.[140]

> The threat of arbitrary detention in relation to allegations of blasphemous speech for journalists is of particular concern, with such detention frequently used to target political speech. For example, in April 2020, prominent Nigerian rights defender Mubarak Bala was arrested without any formal charges on allegations of blasphemy. His arrest followed allegations to the Kano police that he had insulted the Prophet in Facebook posts. In December 2020, the Federal High Court in Abuja ruled that Mr. Bala's detention, as well as the denial of his ability to choose his own legal representation, constituted gross infringements of his rights to personal liberty, fair hearing, freedom of thought, expression and movement. The Court ordered his release on bail as well as an award of damages. When Mr. Bala had still not been released a year after his arrest, in April 2021, UN experts called on Nigerian authorities to comply with the decision of the Federal High Court. The experts stated that 'The arrest and prolonged detention of Mr. Bala is not only a flagrant violation of fundamental rights, but it has also had a chilling effect on the exercise of fundamental freedoms in Nigeria'.[141]
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> In August 2021, after 15 months of arbitrary detention, formal charges for 'inciting disturbance and insulting' and 'exciting contempt of religious creed' under Sections 210 and 114 of the Penal Code were brought against Mr. Bala. He was convicted in April 2022 and sentenced to 24 years in prison.[142]

3.1.3 Bail

International human rights law provides that, as a general rule, people awaiting trial shouldn't be in custody.[143] General Comment No. 35 emphasises that 'detention in custody of persons awaiting trial shall be the exception rather than the rule'. However, in several countries, including India and Pakistan, those accused of blasphemy offences are not released on bail as a matter of right, but only if it is granted by a court as a matter of discretion.[144]

While there are cases in which judicial discretion has been exercised to grant journalists bail, the criminal law process itself provides punishment. An example is the case of Shirin Dalvi, the editor of an Urdu-language newspaper in India that reprinted a cartoon from satirical French magazine *Charlie Hebdo* – a cartoon of the Prophet carrying a sign saying '*tout est pardonné*' (all is forgiven).[145] She was arrested on charges of deliberately outraging religious feelings.[146] Although Dalvi was released on bail, it was only in March 2019 – four years later – that the High Court of Bombay quashed the case.[147]

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140 See section 1.2 on international standards regarding blasphemy laws above.

141 Statement by Mr. Ahmed Shaheed, Special Rapporteur on freedom of religion or belief; Ms. Mary Lawlor, Special Rapporteur on the situation of human rights defenders; Mr.Nils Melzer, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; Ms. Tlaleng Mofokeng, Special Rapporteur on the right to physical and mental health; Mr. Morris Tidball-Binz, Special Rapporteur on extrajudicial, summary or arbitrary executions; Mr. Fernand de Varennes, Special Rapporteur on minority issues; Ms. Irene Khan, Special Rapporteur on the promotion and protection of the right to freedom of expression; and Mr. Diego García-Sayán, Special Rapporteur on the independence of judges and lawyers, 'One year after: Authorities must comply with Federal High Court decision to release Mubarak Bala on bail', 28 April 2021, **<www.ohchr.org/en/press-releases/2021/04/one-year-after-authorities-must-comply-federal-high-court-decision-release>** accessed 7 April 2023.

142 United States Commission on International Religious Freedom, 'Mubarak Bala', **<www.uscirf.gov/religious-prisoners-conscience/mubarak-bala>** accessed 7 April 2023.

143 ICCPR, Art 9(3).

144 The criminal procedure laws of India and Pakistan allow the discretion of the courts in assessing and granting bail in non-bailable offences. See Code of Criminal Procedure 1898, Pakistan, s 497; Code of Criminal Procedure 1973, India, s 437.

145 *The Sydney Morning Herald*, 'Mumbai police arrest editor for publishing Charlie Hebdo cover' (30 January 2015) <www.smh.com.au/world/mumbai-police-arrest-editor-for-publishing-charlie-hebdo-cover-20150130-131ksn.html> accessed 15 January 2021.

146 Indian Penal Code 1860, s 295A.

147 *Shirin Dalvi v State of Maharashtra* [order dated 27.03.2019] [W.P. No. 450/2015 & W.P. No. 525/2015]

3.2 Prior state approval

In several countries, including Spain, Pakistan, India, Samoa, as well as the Australian state of Tasmania, prior approval of prosecutions by either the Attorney General or another senior government official is required for blasphemy proceedings to commence. This is a major funnel in limiting the number of blasphemy complaints that go to trial but does not exist in many jurisdictions.

For example, in Egypt, a court dismissed charges against leading Egyptian feminist and writer, Nawal el-Saadawi, for her remarks regarding the origin of the hajj (tradition of annual Islamic pilgrimage) and the Sharia inheritance rules by which men can receive double the amount of women.[148] The prosecution did not go forward as the court dismissed the charges for basic procedural violations and the absence of prior approval to prosecute.[149]

3.3 Length of trial

People accused of crimes have the right to be tried without undue delay.[150] General Comment No. 32 elaborates on this right. This ensures, among other things, that legal expenses are limited and accused persons are not kept in a state of uncertainty for longer than absolutely necessary.[151] A speedy trial is also an important aspect of the right to procedural equality and fairness under Article 14 of the ICCPR.[152] When persons accused of blasphemy are detained in custody throughout the course of the trial, as many are, the length of the trial is of particular concern. Article 14 requires that such denial of liberty must be shown by the prosecution to serve the interests of justice, must not violate the presumption of innocence and must not last longer than necessary and reasonable as per the facts of the case.[153]

However, our study shows that in a number of jurisdictions where prosecution of blasphemy charges is common, trials tend to take undue amounts of time.

148 Freedom House, *Policing Belief: The Impact of Blasphemy Laws on Human Rights* (21 October 2010) **<https://freedomhouse.org/sites/default/files/Policing_Belief_Full.pdf>** accessed 15 January 2021.

149 In Egypt, blasphemy cases are often brought as *hisba* cases whereby one Muslim can bring a case against another Muslim for perceived violations against Islam. Legal precedents permit the courts to convict individuals of blasphemy and deem them apostates as a result of hisba suits. In 1996, the Egyptian Parliament passed a law prohibiting *hisba* claims from reaching court unless they are first deemed valid by a prosecutor. For further details, see: 'Policing belief: The Impact of Blasphemy Laws on Human Rights' Freedom House **<www.freedomhouse.org/sites/default/files/PolicingBelief_Egypt.pdf>** accessed 25 June 2021; BBC, 'Egypt Apostasy Trial Adjourned' (9 July 2001) **<http://news.bbc.co.uk/1/hi/world/middle_east/1430497.stm>** accessed 15 January 2021.

150 Human Rights Committee General Comment No. 32, *Article 14, Right to equality before courts and tribunals and to a fair trial*, 23 August 2007, §35

151 Human Rights Committee General Comment No. 32, *Article 14, Right to equality before courts and tribunals and to a fair trial*, 23 August 2007, §35.

152 Human Rights Committee General Comment No. 32, *Article 14, Right to equality before courts and tribunals and to a fair trial*, 23 August 2007, §27.

153 Human Rights Committee General Comment No. 32, *Article 14, Right to equality before courts and tribunals and to a fair trial*, 23 August 2007, §35.

For instance, in Mauritania, Mohammad Shaikh Ould Mohammad Ould M'khaitir, a blogger and freelance journalist, published an article titled '[r]eligion, religiosity and blacksmiths' on a news website in 2013, in which he denounced the use of Islam to justify Mauritania's social caste system. M'khaitir was charged with apostasy and initially sentenced to death. The UN and international experts called for his release. However, he was incarcerated for five and half years on charges of blasphemy before he was released in 2019.[154] The duration for which M'Khaitir was held in custody was more than double the two-year long sentence he ultimately received.

In India, journalist Siddique Kappan was arrested by the police in 2020 while on his way to report on a case of gangrape and murder of a Dalit girl (a marginalised community). He was charged under various laws, including the blasphemy provision relating to religious insult. He was kept in jail for 28 months, without being convicted of any offence, before being released on bail. However, the case remains pending.[155]

This trend is exacerbated by the vagueness inherent in many blasphemy laws.[156] The overbroad and ambiguous phrasing of blasphemy laws often means that the determination of blasphemy is left up to the subjective satisfaction of the executing authority. The lack of precision prevents cases that should be dismissed at an early stage from having that benefit, and far more cases are determined after a long trial.

General Comment No. 34 says:

> 'A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.'[157]

3.4 Double jeopardy

Blasphemy may be prosecuted under a number of laws beyond explicit blasphemy laws, including more broadly framed public order and anti-terror laws, as well as laws that regulate online speech. Article 14 of the ICCPR prohibits double jeopardy and guarantees this essential aspect of fair trial, the right to remain free from being tried or punished again for an offence for which an individual has already been finally convicted or acquitted.[158]

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154 BBC, 'Mauritania releases Facebook blogger convicted of blasphemy' (30 July 2019) <www.bbc.com/news/world-africa-49165640> accessed 15 January 2021.

155 Livelaw, 'Siddique Kappan's Release On Bail After 846 Days Is A Harsh Reminder Of What Can Happen To Our Precious Freedom' (4 February 2023) **<www.livelaw.in/columns/siddique-kappans-release-after-846-days-harsh-reminder-what-can-happen-to-our-precious-freedom-220755>** accessed 11 April 2023.

156 See section 1.3.1.2 on vagueness.

157 Human Rights Committee General Comment No. 34, *Article 19: Freedoms of opinion and expression*, 12 September 2011.

158 International Covenant on Civil and Political Rights 1966; Human Rights Committee General Comment No. 35, *Article 9, Liberty and security of person*, 16 December 2014.

In the case of Geo TV in November 2014, a Pakistani actress, her husband, and the owner of the Jang-Geo media group were fined 300,000 Pakistani rupees and sentenced to ten years' imprisonment on the charge of blasphemy by courts in Gilgit Baltistan.[159] The act in question was for allegedly using defamatory and blasphemous content against the family of the Prophet. The court held that the scene qualified as a malicious act of blasphemy which violated the Anti-Terrorism Act, 1997.

The accused journalist and others had already been fined by the regulatory authority under the Pakistan Electronic Media Regulatory Authority Ordinance 2002 (PEMRA). The media license granted to the channel was also suspended. Separately, the defendants were tried and acquitted by the two different courts, prior to the Gilgit Baltistan Court. The first case involved 'the same set of allegations, same set of facts and same set of evidence'[160] as the case that was later tried by the Gilgit Baltistan court, and the second case involved blasphemy charges under the Pakistan Penal Code (s 295-A and 298-A) for the same incident.

In 2016, the Supreme Appellate Court of Gilgit Baltistan acquitted the defendants of the terror charge on grounds of double jeopardy. The Court also noted that 'the PEMRA Ordinance 2002 ha[d] an overriding effect upon other previous enacted special laws'.[161] So the alleged offences were within the purview of the PEMRA which was a special law to deal with media cases and not within the purview of the Anti-Terrorism Act.

While the safeguards afforded by the principle of double jeopardy were ultimately applied in the case, several other procedural concerns were prominent. The accused were prosecuted in almost all the four provinces of Pakistan. Around 99 cases were registered, with largely similar sets of allegations, facts and evidence, including nine cases in the territory of Gilgit Baltistan itself. Further, the defendants' appeal was dismissed at the first instance because they were not present before the courts, although the trial itself was held in absentia.

3.5 Diversion from criminal justice: role of press councils

The 'marketplace of ideas' is rarely a free market. While supporting the free speech rights to journalism that is or appears to be blasphemous, it is important not to relegate the offended to the festering of hurt feelings. As Justice Brandeis of the US Supreme Court said, 'it is hazardous to discourage thought, hope and imagination, that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies, and that the fitting remedy for evil counsels is good ones'.[162]

A Press Council can serve an important role in protecting journalists and strengthening the freedom of press through self-regulation, including mechanisms for addressing complaints against journalists.[163]

159 Columbia Global Freedom of Expression, 'The case of Veena Malik, Asad Bashir and Mir Shakil ur Rahma' **<https://globalfreedomofexpression.columbia.edu/cases/the-case-of-veena-malik-asad-bashir-and-mir-shakil-ur-rahman>** accessed 15 January 2021.

160 *Mst. Shaista Lodhi D/o Ali Gohar & 02 others v The State of Gilgit-Baltistan* (Cr. Appeal No. 15/2016 In Cr. PLA No. 18/2016), p. 27.

161 *Mst. Shaista Lodhi D/o Ali Gohar & 02 others v The State of Gilgit-Baltistan* (Cr. Appeal No. 15/2016 In Cr. PLA No. 18/2016).

162 *Whitney v California* 274 US 357 (1927).

163 UNESCO, 'Indonesia and Myanmar Press Councils Share Lessons on Media Freedom' (26 November 2020) **<https://bangkok.unesco.org/content/indonesia-and-myanmar-press-councils-share-lessons-media-freedom>** accessed 15 January 2021.

Indonesia has a history of detaining and persecuting people under its blasphemy laws.[164] In January 2023, the President of Indonesia signed a new Criminal Code which expands the applicable provisions on blasphemy from one to six, though the applicable criminal penalty has been reduced from five years to three years.[165] In March 2017, a court in Jakarta found two leaders of the Gafatar religious community guilty of blasphemy and sentenced them to five years' imprisonment.[166] The Constitutional Court of Indonesia stripped the Home Ministry of the power to protect human rights by prioritising religious interests and held that the Central Government could not repeal local Sharia (Islamic law) ordinances adopted by local governments, even if they threaten the right to freedom of expression.[167]

In December 2014, Meidyatama Suryodiningrat, the chief editor of the Jakarta Post, one of Indonesia's leading English-dailies, was named as a suspect for religious defamation during a police investigation. The case resulted from a cartoon published in the Jakarta Post in which a flag similar to that of the Islamic State was replicated with a skull and crossbones and included the phrase 'there is no God but Allah'. The cartoon also showed the words Muhammad and Allah, on the skull.[168] Though an apology was issued and the cartoon was retracted, a formal complaint was registered against the editor.

At the time, however, the case was covered by a Memorandum of Understanding (MoU) between the Press Council and the National Police signed in 2012. Journalists' associations represented to the police that the case was within the authority of the Press Council to deal with. This led to the case being referred to the Press Council for resolution, without any criminal charges made.[169] The MoU was between the Indonesian National Police (Polri) and the Press Council, and on the coordination of law enforcement and prosecution of freedom of the press (on 9 February 2012). One provision of the MoU required coordination of the law enforcement response to public complaints about news reporting; the Indonesian Police would not immediately act on such reports. They would direct the parties involved in a dispute to take gradual steps, from the right of reply, to the right to correct and finally to submit the complaint to the Press Council.[170] The MoU between the Press Council and the police to deal with complaints, including blasphemy complaints against journalists, was a positive development.[171] A lacunae in the MoU, however, was that it did not provide a clear definition of matters categorised as press offences.[172]

3.6 Positive obligation of states to prevent violence

All state parties to the ICCPR have a general obligation to ensure that all persons are able to enjoy the rights available under the Covenant.[173] This includes a positive obligation to protect individuals against violations of their rights by the state, as well as acts committed by private individuals and entities.[174] In the context of freedom of religion or belief and blasphemy laws, there is a recognised

164 Randy Wirasta Nandyatama, Dio Herdiawan Tobing, Shah Suraj Bharat (eds.) 'The religion of the ASEAN Human Rights Mechanism: Institutional and Thematic Issues Within' (ASEAN Studies Centre UGM 2019), p. 41.

165 Human Rights Watch, 'Indonesia: New Criminal Code Disastrous for Rights', 8 December 2002 <www.hrw.org/news/2022/12/08/indonesia-new-criminal-code-disastrous-rights> accessed 7 April 2023. See Articles 300–305 of the Criminal Code 2022 (which comes into effect on 2 January 2026). **<www.hukumonline.com/pusatdata/detail/17797/rancangan-undang-undang-2022/document?utm_medium=pusatdata>** accessed 7 April 2023.

166 Indonesia's Anti-Gafatar Campaign Ends in Blasphemy Convictions' (Human Rights Watch, 7 March 2017) **<www.hrw.org/news/2017/03/07/indonesias-anti-gafatar-campaign-ends-blasphemy-convictions>** accessed 4 January 2021.

167 Randy Wirasta Nandyatama, Dio Herdiawan Tobing, Shah Suraj Bharat (eds.) The Evolution of the ASEAN Human Rights Mechanism: Institutional and Thematic Issues Within (ASEAN Studies Centre UGM 2019), p. 42.

168 International Federation of Journalists, 'IFJ/AJI condemn police intervention in Jakarta Post blasphemy matter' (17 December 2014) **<www.ifj.org/media-centre/news/detail/category/press-releases/article/ifjaji-condemn-police-intervention-in-jakarta-post-blasphemy-matter.html>** accessed 15 January 2021.

169 Freedom House, 'Freedom of the Press 2016 - Indonesia' **<www.ecoi.net/en/document/1398013.html>** accessed 7 April 2023.

170 T Mulya Lubis 'Two Faces of Freedom of the Press in Indonesia's Reformation Era' *Media Law and Policy in the Internet Age*, Oxford: Hart Publishing (2017) [227]-[236].

171 UNESCO, 'Indonesia and Myanmar Press Councils Share Lessons on Media Freedom' (26 November 2020) **<https://bangkok.unesco.org/content/indonesia-and-myanmar-press-councils-share-lessons-media-freedom>** accessed 15 January 2021.

172 Suriyanto, 'The Function of the Press Council in Supporting Legal Protection for Journalists to Actualise Press Freedom' (2020), Journal of Politics and Law *<www.ccsenet.org/journal/index.php/jpl/article/view/0/42171>* accessed 15 January 2020.

173 ICCPR, Art 2.

174 Human Rights Committee General Comment No. 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 29 March 2004; Human Rights Committee General Comment No. 34, *Article 19: Freedom of opinion and expression*, 12 September 2011.

need to protect minority religions and dissenters (from majority or established religions) from discrimination, hostility and violence.[175]

> Avijit Roy's case was singled out by the Special Rapporteur on the freedom of religion; it demonstrates some of the worst consequences of state inaction.
>
> Avijit Roy and his wife, Rafida Ahmed, were attacked by persons with machetes in the streets of Dhaka. Although his wife recovered from injuries sustained in the brutal attack, Roy died shortly after he was taken to hospital. His murder was part of a growing trend of violent attacks against bloggers and atheists; it intensified in the period of 2013–2016, during which at least ten bloggers and publishers were attacked and killed. Amid rising demands for a law to make blasphemy a capital crime, the government responded by stating that such a law was not necessary since the existing legislation prohibited gratuitously offensive attacks on religion. In 2013, the government set up a committee to track bloggers and others making derogatory statements online about Islam. Subsequently, a list of the names of 84 bloggers who wrote on religion, reportedly compiled by an extremist group, was made public. At least seven individuals on that list, including Roy, were killed in the period of 2014–2016, and several others have gone into hiding.[176]

3.7 Religious courts and intervention by religious bodies

Journalists and other speakers have the right to fair trials and equality before *all* courts and tribunals. General Comment No. 32 acknowledges the role of religious courts and notes that proceedings before such courts must be limited to minor civil and criminal matters and must meet the basic requirements of fair trials and due process.[177] In addition, Article 14 of the ICCPR guarantees the right to an independent, impartial and competent court established by law.

Religious intervention leading to discriminatory trial proceedings in blasphemy cases can arise in at least two ways. First, when the prescribed legal procedure explicitly mandates religious intervention, for instance, the requirement under Pakistani law for certain cases of blasphemy against Islam to be judged by Muslim judges only,[178] and the exclusive power that Moroccan *ulemas* (Muslim clerics) have to issue fatwas against people who commit apostasy, punishing them with the death penalty.[179] The second is when external influence may be exerted on trial proceedings by religious bodies. General Comment No. 32 elaborates on the right to fair trials and the impact that external influence may have on this right:

> 'Fairness of proceedings entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive. A hearing is not fair if, for instance, the defendant in criminal proceedings is faced with the expression of a hostile attitude from the public or support for one party in the courtroom that is tolerated by the court, thereby

175 Report of Special Rapporteur on freedom of religion or belief, Human Rights Council, UN Doc. A/HRC/40/58 (5 March 2019) (by Ahmed Shaheed).

176 Report of Special Rapporteur on freedom of religion or belief, Human Rights Council, UN Doc. A/HRC/40/58 (5 March 2019) (by Ahmed Shaheed).

177 Human Rights Committee General Comment No. 32, *Article 14, Right to equality before courts and tribunals and to a fair trial*, 23 August 2007, 7 [24].

178 Cases under section 295-C of the Pakistani Penal Code (which deals with the use of derogatory remarks against the Prophet) must be heard by a Muslim presiding judge in the court of first instance.

179 Ferdaouis Bagga and Kirsten Lavery, 'Apostasy, Blasphemy and Hate Speech Laws in Africa', *United States Commision on International Religious Freedom* (December 2019) p. 11. **<www.justice.gov/eoir/page/file/1243281/download>** accessed 25 June 2021; Code of Criminal Procedure 1898, Pakistan, Schedule II.

impinging on the right to defence, or is exposed to other manifestations of hostility with similar effects.'

The trial of Parvesh Kambaksh, a student of journalism in Afghanistan, was reportedly influenced by clerics.[180] He was arrested by the National Directorate of Security in October of 2007 on charges of anti-Islamic activity as he had edited and distributed an online article that critiqued the role of women in Islam. Although he was eventually granted amnesty, the lower provincial court initially sentenced him to death in 2008 in a closed-door trial, reportedly on the advice of local clerics.[181]

Intervention by religious bodies was also reported in the arrest of four journalists working with the Urdu daily *Mohasib* in 2001 in Pakistan. The arrest was on charges of blasphemy for publishing an article entitled 'The Beard and Islam' which contested the view of certain Muslim clerics that a beardless man cannot be a good Muslim and criticised the exploitation of religious faith for personal gain.[182] While officials at both the federal and provincial levels agreed that the article did not contain any blasphemous material, the journalists were still arrested amid the public outcry.[183] It was reported that the police refused to drop the charges against the four journalists, citing pressure from religious groups.[184]

180 Human Rights Watch, 'Afghanistan: 20-Year Sentence for Journalist Upheld' (*HRW*, 10 March 2009) **<www.hrw.org/news/2009/03/10/afghanistan-20-year-sentence-journalist-upheld>** accessed 15 January 2021.

181 Committee to Protect Journalists, 'Journalism student given 20-year jail term in Afghanistan' (CPJ, 21 October 2008) **<https://cpj.org/2008/10/journalism-student-given-20-year-jail-term-in-afgh-1.php>** accessed 15 January 2021. The appellate court commuted Parvesh's death sentence to 20 years of rigorous imprisonment which was upheld by the Supreme Court. However, President Hamid Karzai later granted him amnesty. See Human Rights Watch, 'Afghanistan: 20-Year Sentence for Journalist Upheld' (HRW, 10 March 2009) **<www.hrw.org/news/2009/03/10/afghanistan-20-year-sentence-journalist-upheld>** accessed 15 January 2021. Religion and Conflict Case Study Series, '*Afghanistan: International Religious Freedom and US Foreign Policy*' (*Berkley Centre for Religion, Peace & World Affairs*, August 2013) **<https://berkleycenter.georgetown.edu/publications/afghanistan-international-religious-freedom-and-us-foreign-policy>** accessed 15 January 2021.

182 Reporters Without Borders, 'Reporters Without Borders Annual Report 2002 – Pakistan' (3 May 2002) **<www.refworld.org/docid/487c523c28.html>** accessed 15 January 2021.

183 Committee to Protect Journalists, 'Four journalists jailed for more than a month on blasphemy charges' (*CPJ*, 12 November 2001) **<https://cpj.org/2001/11/four-journalists-jailed-for-more-than-a-month-on-b.php>** accessed 15 January 2021.

184 Committee to Protect Journalists, 'Four journalists jailed for more than a month on blasphemy charges' (*CPJ*, 12 November 2001) **<https://cpj.org/2001/11/four-journalists-jailed-for-more-than-a-month-on-b.php>** accessed 15 January 2021.

4. Recent changes to blasphemy laws

4.1 Limiting or repealing blasphemy laws

While the *Charlie Hebdo* incident marked a turning point in the relationship between religion and freedom of expression,[185] the trend of repealing blasphemy laws in Europe predates the 2015 attacks.

In 2008, the United Kingdom passed the Criminal Justice and Immigration Act which repealed the offence of blasphemy. The debate preceding the Act raised two main points which supported the repeal of the blasphemy laws that have since been echoed in a number of other countries where blasphemy laws have been repealed.[186] First, it was argued that the provision had fallen into disuse. And secondly, the government noted the adoption of other laws relating to acts of religious hatred, which require incitement to violence as an essential fundamental ingredient of the offense.[187] It was also argued that the offences of blasphemy and blasphemous libel were unworkable in the modern age and that '[i[f our Parliament takes this step, it will be an example elsewhere'.[188] However, blasphemy remains a crime under Northern Ireland's common law, and civil penalties for blasphemous libel (seizure of material containing the libel) continue to operate under Northern Ireland's Criminal Libel Act, 1819.[189]

Since 2015, at least eight states have repealed their laws on blasphemy entirely,[190] with other nations amending blasphemy laws to limit their reach.[191] The Scottish government repealed its blasphemy law in April 2020[192] and, in July 2020, Sudan repealed its apostasy law and removed flogging as a punishment for blasphemy.[193]

In the case of Iceland, the repeal of the blasphemy law contained in the General Penal Code was prompted by the *Charlie Hebdo* shootings.[194] The move caused divisions in the country as it was supported by the Lutheran Church of Iceland, the most popular sect of Christianity in the country,

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185 Reporters without Borders, 'Charlie Hebdo – "trial of the most extreme form of censorship"' **<https://rsf.org/en/news/charlie-hebdo-trial-most-extreme-form-censorship>** (*RSF*, 31 August 2020) accessed 6 May 2022.

186 Lords Hansard, 5 March 2008 **<https://publications.parliament.uk/pa/ld200708/ldhansrd/text/80305-0005.htm>** accessed 15 January 2021.

187 The Parliamentary Under-Secretary of State, Department for Communities and Local Government (Baroness Andrews): 'First, the law has fallen into disuse and therefore runs the risk of bringing the law as a whole into disrepute. Secondly, we now have new legislation to protect individuals on the grounds of religion and belief.' Lords Hansard, 5 March 2008 **<https://publications.parliament.uk/pa/ld200708/ldhansrd/text/80305-0005.htm>** accessed 2 April 2023.

188 Lords Hansard, 5 March 2008 **<https://publications.parliament.uk/pa/ld200708/ldhansrd/text/80305-0005.htm>** accessed 2 April 2023.

189 Northern Ireland Criminal Libel Act, 1819, section 1; See Northern Ireland Humanists, 'Humanists launch campaign to repeal ancient blasphemy laws in Northern Ireland' (27 March 2019) **<https://humanism.org.uk/2019/03/27/humanists-launch-new-campaign-to-repeal-ancient-blasphemy-laws-in-northern-ireland>** accessed 23 June 2021.

190 Canada, Denmark, Greece, Iceland, Ireland, Malta, New Zealand and Norway. See United States Commission on International Religious Freedom, 'Violating Rights: Enforcing the World's Blasphemy Laws', 2020, p. 7 **<www.uscirf.gov/sites/default/files/2020%20Blasphemy%20Enforcement%20Report%20_final_0.pdf>** accessed 22 June 2021.

191 For instance, Italy substantially modified its blasphemy laws and Sudan modified its blasphemy provision to remove the punishment of flogging. See United States Commission on International Religious Freedom, 'Violating Rights: Enforcing the World's Blasphemy Laws', 2020, p. 52 **<www.uscirf.gov/sites/default/files/2020%20Blasphemy%20Enforcement%20Report%20_final_0.pdf>** accessed 7 April 2023.

192 Humanist International, 'Scotland abolishes its "Blasphemy" law', (24 April 2020) **<https://humanists.international/2020/04/scotland-abolishes-its-blasphemy-law>** accessed 23 June 2021.

193 BBC, 'Sudan repeals apostasy law and alcohol ban for non-Muslims' (12 July 2020) **<www.bbc.com/news/world-africa-53379733>** accessed 23 June 2021.

194 Eugene Volokh, 'Iceland repeals Blasphemy Law, in move triggered by Charlie Hebdo' (*The Washington Post*, 6 July 2015) **<www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/06/iceland-repeals-blasphemy-law-in-move-triggered-by-charlie-hebdo-murders>** accessed 23 June 2021.

while the Catholic Church, Parish of Berunes (East Iceland) and Pentecostal Churches opposed the effort.[195] Norway had initially moved to delete its mostly dormant blasphemy law as early as 2009; it finally repealed its blasphemy law in 2015, as a response to the shootings.[196] Similarly, in 2016, in response to *Charlie Hebdo*, France officially repealed the offence of blasphemy that existed in the Alsace-Moselle region.[197] In Malta, where the law punishing the vilification of the Roman Catholic religion had been in place since 1933 and was used by the authorities in the past, the government repealed its blasphemy laws in 2016 amid severe criticism.[198] The move was criticised by many, including the Archbishop of Malta. While revising their penal law in 2019, Greece decided to drop the blasphemy provision from the code, thereby repealing it.[199] When subsequent calls to reinstate the provision were made later, it was met with strong opposition from the public, and the law remains off the books.[200] The repeal of blasphemy laws in countries like Canada[201] and New Zealand,[202] while surprisingly recent, mostly aimed at removing old and archaic laws which were no longer used or relevant. For instance, there have only been five known prosecutions under Canada's blasphemy law since it was enacted in 1892, all between 1901–1936.[203] The repealing laws were passed with little controversy as none of the jurisdictions actively punished blasphemy, regardless of the provision.

4.2 Introducing new laws and strengthening blasphemy laws

A number of jurisdictions have recently strengthened the laws relating to blasphemy, apostasy, or the defamation of religion. Since 2014, at least seven countries have either amended their blasphemy laws to increase the punishment or introduced new laws prohibiting blasphemy.[204] Most recently,

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195 Eugene Volokh, 'Iceland repeals Blasphemy Law, in move triggered by Charlie Hebdo' (*The Washington Post*, 6 July 2015) **<www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/06/iceland-repeals-blasphemy-law-in-move-triggered-by-charlie-hebdo-murders>**; Kevlin Rawlinson, Iceland repeals blasphemy ban after Pirate Party Campaign' (*The Guardian*, 3 July 2015) **<www.theguardian.com/world/2015/jul/03/iceland-repeals-blasphemy-law-pirate-party-campaign>** accessed 15 January 2021

196 Eugene Volokh, 'Norway Repeals Blasphemy Laws in Response to Charlie Hebdo Attacks' (*The Washington Post*, 9 May 2015) **<www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/08/norway-repeals-blasphemy-law-in-response-to-charlie-hebdo-murders>**; 'Norway Ends Blasphemy Laws after Hebdo attacks' *The Local* (7 May 2015) <www.thelocal.no/20150507/norway-scraps-blasphemy-law-after-hebdo-attacks> accessed 15 January 2021.

197 Following an amendment presented by the French Senate and adopted in 2016, the French Parliament officially repealed the offense of blasphemy from the regional criminal law applicable in the Alsace-Moselle region with the publication of the Law on Equality and Civic Rights of 27 January 2017, although this offense was already no longer applied in practice (Article 172 of Law no. 2017-86) **<www.legifrance.gouv.fr/loda/article_lc/LEGIARTI000033938303>** accessed 23 March 2023; The Senate removes the offense of blasphemy that applies in Alsace-Moselle. 'Le Sénat supprime le délit de blasphème qui s'applique en Alsace-Moselle' (Loractu.fr, October 2016) **<http://loractu.fr/france/14345-le-senat-supprime-le-delit-de-blaspheme-qui-s-applique-en-alsace-moselle.html>** accessed 23 March 2021.

198 Paul Cocks, 'Updated | Religious vilification removed from Maltese law, Archbishop: 'Lord forgive them…' (*Malta Today*, 12 July 2016) **<www.maltatoday.com.mt/news/national/67475/parliament_approves_bill_decriminalising_porn_and_repealing_religious_vilification>** accessed 15 January 2021. Please note, however, that uttering an insult, 'even though in a state of intoxication', that consists of 'blasphemous words or expressions' is a contravention under Art. 342 of the Criminal Code. The minimum penalty is a fine (ammenda) of 11.65 euros and the maximum penalty is three months in prison. Article 342, Criminal Code of Malta. Furthermore, under Article 13 of the Broadcasting Act, the Broadcasting Authority may impose a requirement in the license that 'nothing is included in the programmes which offends against religious sentiment…'. Article 13(1), Broadcasting Act of Malta <https://ba.org.mt/legislation> accessed 7 April 2023.

199 Humanists UK, 'Blasphemy Law to be abolished in Greece under new criminal code' (17 June 2019) **<https://humanism.org.uk/2019/06/17/blasphemy-to-be-abolished-in-greece-under-new-criminal-code>** accessed 15 January 2021.

200 European Humanist Federation, 'The EHF Welcomes the Withdrawal of the Bill reintroducing the crime of blasphemy in Greece' (*EHF*, 13 November 2019) **<https://humanistfederation.eu/the-ehf-welcomes-the-withdrawal-of-the-bill-reintroducing-the-crime-of-blasphemy-in-greece>** accessed 15 January 2021.

201 Bill C-51 (An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act) 2018, s 30. **<www.parl.ca/DocumentViewer/en/42-1/bill/C-51/royal-assent>** accessed 15 January 2021.

202 The law on blasphemous libel was repealed by the Crimes Amendment Bill in March 2019; the last known conviction was in 1922. Hon Andrew Little 'Blasphemous libel law repealed' (*BeeHive*, 5 March 2019) **<www.beehive.govt.nz/release/blasphemous-libel-law-repealed>** accessed 15 January 2021.

203 See Jeremy Patrick, 'Canada Blasphemy Law in Context: Press, Legislative and Public Reactions', 16(1) Annual Survey of International and Comparative Law Article 9, 129.

204 Brunei, Indonesia, Kazakhstan, Mauritania, Morocco, Nepal, Oman and Pakistan. See United States Commission on International Religious Freedom, 'Violating Rights: Enforcing the World's Blasphemy Laws', 2020, p. 7 **<www.uscirf.gov/sites/default/files/2020%20Blasphemy%20Enforcement%20Report%20_final_0.pdf>** accessed 22 June 2021.

Pakistan has taken steps towards passing a law to expand its blasphemy provisions and provide for increased punishments for using derogatory remarks against holy persons.[205] In Iran, in 2022, a new article added to the Penal Code imposes prison sentences and fines on anyone who insults 'divine religions or Islamic schools of thought recognized under the Constitutions with the intent to cause violence or tensions in the society'.[206] Indonesia's new Criminal Code, which was passed in 2022, expands existing provisions relating to blasphemy.[207] In several of these countries, the changes to the blasphemy law were brought about following high profile domestic cases that resulted in public outrage.

For example, in Russia, the changes in the blasphemy law were brought about following the case of a band, Pussy Riot, and its song 'Punk Prayer: Virgin Mary, Drive Putin Away' in 2013.[208] The members of the band were convicted of 'hooliganism motivated by religious hatred'[209] and sentenced to two years' imprisonment for the existing offence of 'hooliganism motivated by religious hatred and enmity with respect to a social group'.[210] Due to the difficulties faced by the prosecution in finding a stronger legal provision under which to prosecute the members of Pussy Riot,[211] the state amended the existing laws to introduce stricter penal provisions for blasphemy and desecration.[212] The amendments were made not to the offence of 'hooliganism' under which the Pussy Riot members were charged, but by elevating the offence of 'hurting the religious feelings of citizens' from an administrative violation to an offence in the criminal code.[213]

In 2012, the Kuwaiti Parliament approved an amendment increasing the punishment for blasphemy from imprisonment for one year to capital punishment,[214] specifically for those cases which dealt with insulting the Prophet or his companions. This amendment was invoked following the arrest of a Kuwaiti citizen who allegedly defamed the Prophet, his wife and his companions on the social media

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205 Human Rights Commission of Pakistan, 'Amendments to Blasphemy Laws create further room for persecution' (20 January 2023) **<https://hrcp-web.org/hrcpweb/amendments-to-blasphemy-laws-create-further-room-for-persecution>** accessed 7 April 2023.

206 Article 499 bis, Book Five of the Islamic Penal Code (on Ta'zirat and Deterrent Punishments). See Article 19, 'Iran's New Islamic Penal Code provisions: Tools for Further Repression', (6 July 2022) **<www.article19.org/resources/irans-new-islamic-penal-code-repression/#:~:text=Article%20499%20bis%20effectively%20criminalises,freedom%20of%20religion%20and%20belief>** accessed 7 April 2023.

207 Human Rights Watch, 'Indonesia: New Criminal Code Disastrous for Rights', 8 December 2002 **<www.hrw.org/news/2022/12/08/indonesia-new-criminal-code-disastrous-rights>** accessed 7 April 2023. See Articles 300–305 of the Criminal Code 2022 (which comes into effect on 2 January 2026). **<www.hukumonline.com/pusatdata/detail/17797/rancangan-undang-undang-2022/document?utm_medium=pusatdata>** accessed 7 April 2023.

208 Volha Kananovich , '"Execute Not Pardon": The Pussy Riot Case, Political Speech, and Blasphemy in Russian Law' (2015) Communication Law and Policy [343]-[422] **<www.researchgate.net/publication/282863591_Execute_Not_Pardon_The_Pussy_Riot_Case_Political_Speech_and_Blasphemy_in_Russian_Law>** accessed 15 January 2021.

209 Geraldine Fagan, 'RUSSIA: Pussy Riot, blasphemy, and freedom of religion or belief' (*Forum 18*, 15 October 2012) **<http://forum18.org/archive.php?article_id=1754>** accessed 15 January 2021.

210 Criminal Code of the Russian Federation, 1996, Art 213.

211 See CBS News, 'Pussy Riot Punk Band Remains Defiant of Putin's Russia' (23 June 2013), **<www.cbsnews.com/news/pussy-riot-punk-band-remains-defiant-of-putins-russia-23-06-2013>** accessed 23 June 2021; policymaker Sergei Markov responds to the question of 'What exact law did [the Pussy Riot members] break?', by saying 'Oh, this issue. That's right. The problem [was] to find the law. Finally, the court found the law'.

212 Thomas Gras, 'Orthodox militiamen declare the hunt for heretics open' (*Le Courier De Russie,* 22 August 2012) **<www.lecourrierderussie.com/societe/2012/08/les-miliciens-orthodoxes-declarent-ouverte-la-chasse-aux-heretiques>** accessed 15 January 2021.

213 Volha Kananovich, '"Execute Not Pardon": The Pussy Riot Case, Political Speech, and Blasphemy in Russian Law' (2015) Communication Law and Policy [343]-[422].

214 Camilla Hall, 'Kuwait approves death penalty for blasphemy' (*Financial Times,* 3 May 2012) **<www.ft.com/content/589e80cc-9525-11e1-ad72-00144feab49a>** accessed 15 January 2021.

platform Twitter.[215] However, the amendment was subsequently rejected by the Emir of Kuwait.[216]

In 2018, Mauritania's blasphemy law was amended to remove procedural safeguards.[217] Previously, a person convicted of apostasy was granted three days to repent, after which the court could order a shortening of the sentence, like in M'khaitir's case.[218] However, following M'khaitir's high profile case, the laws governing blasphemy and apostasy were amended to remove the possibility of repentance, thereby allowing for no remedy in cases where the death penalty was imposed.[219]

215 Catrina Stewart, 'Kuwait may introduce death penalty for blasphemy after man's Twitter arrest' *Independent UK* (13 April 2012) **<www.independent.co.uk/news/world/middle-east/kuwait-may-introduce-death-penalty-for-blasphemy-after-mans-twitter-arrest-7640699.html>** accessed 15 January 2021.

216 Issam Saliba, 'Kuwait: Blasphemy Against Islam, Library of Congress' (18 June 2012) **<www.loc.gov/law/foreign-news/article/kuwait-blasphemy-against-islam>** accessed 15 January 2021.

217 'Death Penalty: UN experts urge Mauritania to repeal anti-blasphemy law', United Nations Office of the High Commissioner for Human Rights Press Release (OHCHR, 7 June 2018) **<www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23186&LangID=E>** accessed 15 January 2021.

218 See section 3.3 on length of trial.

219 Committee to Protect Journalists, 'Mohamed Cheikh Ould Mohamed' **<https://cpj.org/data/people/mohamed-cheikh-ould-mohamed>** accessed 15 January 2021.

5. Recommendations

These recommendations are split into three parts. The **first** set of recommendations is to repeal blasphemy laws, especially those that carry criminal penalties.

The **second** set of recommendations detail the steps that can be taken to limit the most prejudicial effects of such laws pending their repeal.

The **third** set of recommendations outlines non-legal interventions by states, including action that supports a rich and diverse media environment and encourages counter-speech by religious leaders and other actors.

5.1 Repeal of blasphemy laws

Blasphemy laws violate the international human rights law, except when they are narrowly tailored to address 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence' as set out in Article 20(2) of the International Covenant on Civil and Political Rights, and comply with other provisions of the Covenant.[220] This is confirmed in the UN Human Rights Committee's General Comment No. 34 on the ICCPR, reports by various UN Special Rapporteurs, the UN-approved Rabat Plan of Action and Beirut Declaration on the Faith for Rights Framework.[221]

According to the Human Rights Committee's 'General Comment' interpreting the scope of Article 19 of the ICCPR:

> '[p]rohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.'[222]

In addition, under the 'Rabat Plan', a codification of international standards approved by the UN High Commissioner of Human Rights, '[b]lasphemy laws are counterproductive ... the right to freedom of religion or belief, as enshrined in relevant international legal standards, does not include the right to have a religion or a belief that is free from criticism or ridicule'.[223]

First and foremost, the death penalty in blasphemy laws and any criminal penalties involving the deprivation of liberty should be repealed immediately.[224]

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220 HRC General Comment No. 34, *Article 19, Right to freedom of speech and expression*, 12 September 2011 §48.

221 OHCHR, 'Faith for Rights' 14th edition (June 2021) **<www.ohchr.org/en/faith-for-rights>** accessed 6 May 2022. Beirut Declaration on Faith for Rights and its 18 commitments promote the resolve not to oppress critical voices and views on matters of religion or belief, however wrong or offensive they may be perceived, in the name of the 'sanctity' of the subject matter.

222 HRC General Comment No. 34, *Article 19, Right to freedom of speech and expression*, 12 September 2011.

223 See Office of the High Commissioner for Human Rights, 'The Rabat Plan of Action' 2012, para 19, **<www.ohchr.org/en/issues/freedomopinion/articles19-20/pages/index.aspx>** accessed 6 May 2022.

224 HRC General Comment No. 36, *Article 6, Right to life*, 3 September 2019.

Democratic states that retain blasphemy laws should lead in abolishing these laws, even if such laws have fallen into disuse. Such abolition would remove the threat they still pose to speech, reduce the possibility of revival, and build momentum towards global reform.

The remit of the Independent High Level Panel of Legal Experts on Media Freedom is to provide legal advice and recommendations to the Media Freedom Coalition (MFC) countries and their partners, including international organisations. It is strongly recommended that MFC States take immediate steps to review and repeal their existing blasphemy laws.

5.2 Limiting the worst harms of blasphemy laws to media freedom

Recognising that states may not immediately repeal blasphemy laws, as the Special Rapporteur on freedom of religion suggests, 'it may be useful to assess the severity of the impact of such laws which render their application particularly problematic'.[225] Amendment is no substitute for repeal, but measures can be taken to increase the level of conformity of such laws with international standards. To limit the impact of blasphemy laws on journalists, the following steps can be taken by states.

Blasphemy laws should also be narrower in scope and drafted more precisely. They should also require a demonstration of *mens rea* where the sanction is criminal and foreseeability where the sanction against the speaker is civil.

Blasphemy laws should never be applied in a discriminatory manner to target particular religions and minority communities or discriminate between believers and non-believers. It is therefore important that the police, prosecutorial cadres, and judiciary reflect the religious diversity of the population. Moreover, recruitment, promotion, and penal consequences based on the commitment of personnel to religious non-discrimination and free speech would foster a rule of law culture.

Blasphemy laws should exempt statements of opinion and truth and provide for defences such as public interest, fair comment, and reasonable publication that are required in the context of defamation laws under the international human rights law.[226]

In addition, states should refuse to recognise convictions for blasphemy for purposes of INTERPOL-triggered arrest warrants, assessments of journalists' visas or any other purpose prejudicial to the convicted person in a non-convicting state.

Due process standards set out in Articles 9 and 14 of the ICCPR must also be implemented in relation to arrests and trials pursuant to such laws. Arrests and any pre-trial detention must comply with the presumption of innocence and be supervised by an independent judicial authority.[227] Blasphemy offences must never be treated as 'non-bailable', trials should take place and be concluded without undue delay, and all the guarantees of Article 14 of the ICCPR must be complied with, including the fact that no external influence should be exerted on proceedings by religious bodies.

Prior approval from a high-ranking independent authority, such as the Minister for Justice, Attorney

225 Report of the Special Rapporteur on freedom of religion or belief, Human Rights Council, UN Doc. A/HRC/40/58 (20 September 2019) (by Ahmed Shaheed) 15.

226 See, eg, General Comment No. 34.

227 See section 3.1.1 on judicial authorisation.

General, or at least a senior police officer or prosecutor, should also be required as an additional safeguard before investigative steps or charges for blasphemy can be laid.

This report recommends that the complainant be required to show actual harm, to state at the threshold, for instance, the circumstances of and their investment in their religious identity, and to display evidence of the effect the speech had on them, all of which gives them the **locus standi** to complain of blasphemy.

5.3 Non-legal interventions

UN Human Rights Council Resolution 16/18 is an important milestone in the discussion on balancing freedom of expression with freedom of religion or belief and equality.

A fundamental principle underlying Resolution 16/18 is a recognition that non-legal interventions such as 'the open public debate of ideas' and 'interfaith and intercultural dialogue' are 'among the best protections against religious intolerance'.[228] The Resolution also highlights that states must ensure that all measures taken to combat intolerance must be consistent with the international human rights law including Article 19(3) of the ICCPR.[229]

5.3.1 Media access, self-regulation and training

States should also encourage members of the media to set up independent organisations to deal effectively with complaints of blasphemy outside a litigation context, such as Press Councils.[230] The appointment of members of Press Councils should be conducted in a transparent manner, and members must have relevant media expertise. Furthermore, clear and fair due process safeguards must be put in place to ensure that the Press Councils can effectively carry out their duties in an independent and rights-protective manner.

States should ensure that domestic policy and regulatory frameworks support pluralism and diversity in media, promoting universal, non-discriminatory access to and means of communication.[231]

In addition, training programmes for media, which promote a better understanding of issues relating to religious diversity and discrimination, should be initiated, supported and encouraged.[232]

States could also engage with the MFC Diplomatic Networks Initiative. This initiative allows MFC member states to leverage their networks of diplomatic missions to protect and promote media freedom in the country where they are based. Within the initiative, a single diplomatic network is a group of embassies working together in a specific country. Activities include issuing statements of concern, undertaking trial observations, hosting events, and conducting trainings.

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228 HRC Resolution 16/18 (11 April 2011), A/HRC/RES/16/18, §4.

229 HRC Resolution 16/18 (11 April 2011), A/HRC/RES/16/18, §2.

230 See section 3.5 on the role of Press Councils.

231 Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred* (UN Doc. A/HRC/22/17/Add.4) (11 January 2013); United Nations Office on Genocide Prevention and the Responsibility to Protect, *Plan of Action for Religious Leaders and Actors to Prevent Incitement to Violence that Could Lead to Atrocity Crimes* (14 July 2017) **<www.un.org/en/genocideprevention/documents/Plan%20of%20Action%20Advanced%20Copy.pdf>** accessed 15 January 2021. See also HRC General Comment No. 34, *Article 19, Freedoms of opinion and expression*, 12 September 2011, §14.

232 UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 'Joint Statement on Racism in Media' (London, 27 February 2001) **<www.osce.org/files/f/documents/f/1/40120.pdf>** accessed 15 January 2021.

5.3.2 Counter-speech, education and promotion of tolerance

States should undertake and promote counter-speech to respond to ideas which may be offensive and allow for a robust discussion. States should provide members of vulnerable religious minorities with the logistics to speak back and respond to wrongful religious speech. This would also have the symbolic function of reaffirming their equal status and civic dignity as members of the political community.[233]

States should also make efforts to disseminate and support religious institutions, messages and statements that denounce violence, actively counter violent extremism and promote discussion rather than intolerance of criticism.[234] Such support can be provided in varied forms, ranging from financial support to ensuring that educational curricula are based on accurate and objective data about a diversity of religious beliefs as well as atheism and science.

States should work towards greater and regular interaction between majority and minority religious and ethnic communities to build mutual trust and acceptance, and policies should be designed with that ideal in mind. This can also be done through socioeconomic and cultural policy. Such policy may include housing, community space, economic development for deprived areas and employment. Education on human rights and duties at various levels provides a supportive role.

5.3.3 Supporting religious actors' ability to further human rights

In accordance with the Beirut Declaration on Faith for Rights, 2017,[235] religious actors must be empowered to meet their responsibilities under the international human rights law. This requires action in areas such as legislation, institutional reforms, supportive public policies and training adapted to local needs.

States should promote respect for religious and cultural diversity, regular intra- and inter-faith dialogue and support for religious leaders' ability to respond to incitement as soon as it occurs in order to prevent tensions from escalating.

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233 Matteo Bonotti & Jonathan Seglow, 'Self-Respect, Domination, and Religiously Offensive Speech' *Ethical Theory & Moral Practice* 22(3), June 2019.

234 United Nations Office on Genocide Prevention and the Responsibility to Protect, *Plan of Action for Religious Leaders and Actors to Prevent Incitement to Violence that Could Lead to Atrocity Crimes* (14 July 2017) **<www.un.org/en/genocideprevention/documents/Plan%20of%20Action%20Advanced%20Copy.pdf>** accessed 15 January 2021.

235 An outcome of a 2017 meeting of faith-based and civil society actors under the aegis of the OHCHR. This follows the 1981 UN Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion of Belief.

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