

## Religion, Race and Human Rights Struggle for Protection of Vulnerable People

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Received Date: 19/02/2021

Acceptance Date: 30/06/2021

DOI: 10.22096/hr.2022.1971787.1522

### Abstract

Discrimination and xenophobia are threats to peace, and in many occasions have led to armed conflicts. Similarly the UN Special Rapporteur on Racism, Doudou Diène finds racism and xenophobia, rather than terrorism, as “the most serious threats to democracy”. On the other hand, international struggle against non-discrimination, fascism and xenophobia, along with protection of minorities, has been concentrated on the racial and national aspects of vulnerable people, rather than the religious ones. This policy seems no more adequate when as Abdelfattah Amor, the former UN Special Rapporteur on religious intolerance states that “there are borderline cases where racial and religious distinctions are far from clear-cut. Abdelfattah Amor adds, “apart from any discrimination, the identity of many minorities, or even large groups of people, is defined by both racial and religious aspects. Hence, many instances of discrimination are aggravated by the effects of multiple identities.” Similarly Diène refers to “the centrality of the amalgamation of the factors of race, culture and religion in the post-9/11 ideological atmosphere of intolerance and polarization.” According to him this atmosphere “favors the incitement to racial and religious hatred... [and] is indicated by the latest controversies about the caricatures of the Prophet Muhammad published by the *Jyllands-Posten* newspaper in Denmark.” The main argument of the paper will be on the similar purpose of race oriented human rights instruments such as CERD Convention, Apartheid Convention and Genocide Convention on the one hand, and religion oriented instruments, such as the Declaration on the Elimination of All Forms of Intolerance Based on Religion or Belief, on the other. The research suggests that while the main purpose of these instruments are to protect all vulnerable people,

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including some people on the ground of race or ethnic and excluding others on ground of religion is not in line with the purpose of these instruments, and itself is discriminatory. To support the argument, another comparison can be made between the purpose of limiting clauses in Articles 19(2) of the ICCPR and 10(2) of the ECHR on the one hand, and Article s 20(2) of the ICCPR and 4 of the CERD Convention, on the other hand. While the purposes of the limitation clauses of the former articles are such matters as public policy or rights of others, the main purpose of the latter articles are protection of vulnerable 'others', which is similar to the purpose of all international and regional instruments on protection of vulnerable, for which affirmative measures have to be undertaken. To protect security and peace and , and in this line to address the shortcoming of legal bases of combating xenophobe and to include all 'others' under the protection of anti-discrimination, anti-racism and anti-xenophobia struggle, the paper suggests exploring the concept of ethnoreligiosity to be replaced, when appropriate, with merely ethnic (racial) or religion element.

**Keywords:** Human Rights; Religion; Race; Vulnerable People.

## I- Introduction

The UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Doudou Diène, finds racism and xenophobia, rather than terrorism, as “the most serious threats to democracy”<sup>1</sup>. Diène refers to “the centrality of the amalgam<sup>1</sup>. the factors of race, culture and religion in the post-9/11 ideological atmosphere of intolerance and polarization.”<sup>2</sup> According to him this atmosphere “favors the incitement to racial and religious hatred... [and] is indicated by the latest controversies about the caricatures of the Prophet Muhammad published by the *Jyllands-Posten* newspaper in Denmark.”<sup>3</sup>

On the other hand, international struggle against non-discrimination, fascism and xenophobia, along with protection of minorities, has been concentrated on the racial and national aspects of vulnerable people, rather than the religious ones. This policy seems no more adequate when the main conflicting element of so-called clash of civilizations is religions. Europe, particularly has another specific concern, which is the improving number of Muslims in the continent. Furthermore, “there are borderline cases where racial and religious distinctions are far from clear-cut.”<sup>4</sup>

By examining the status of two elements of race and religion in the core human rights instruments, the main argument of the paper will be on the similar purpose of race oriented human rights instruments such as CERD Convention, Apartheid Convention and Genocide Convention on the one hand, and religion oriented instruments, such as the Declaration on the Elimination of All Forms of Intolerance Based on Religion or Belief, on the other, when the issue of protection of vulnerable is concerned. The research suggests that whenever the purpose of the above mentioned instruments are to protect all vulnerable people, including some people on the ground of race or ethnic and excluding others on ground of religion is not in line with the purpose of these instruments, and itself is discriminatory.

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1. UN Doc. A/HRC/2/3, ‘Incitement to Racial and Religious Hatred and the Promotion of Tolerance’, 20 September 2006.

2. UN Doc. A/HRC/2/3, ‘Incitement to Racial and Religious Hatred and the Promotion of Tolerance’, 20 September 2006.

3. UN Doc. A/HRC/2/3, ‘Incitement to Racial and Religious Hatred and the Promotion of Tolerance’, 20 September 2006.

4. Abdelfattah Amor, Special Rapporteur of the Commission on Human Rights, ‘Racial Discrimination and Religious Discrimination: Identification and Measures’, presented at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance at Geneva, 1-5 May 2000, U.N. Doc.A/CONF.189/PC.1/7 (13 April 2000).

There are however some other human rights areas, which are specific to the element of religion. ‘Religion’ unlike ‘race’, is itself a subject of rights which are known as ‘religious rights’. Furthermore for some states limitations on human rights might be linked to the religion when the issues of public order, moral values and rights of others are concerned.

To support the argument, another comparison can be made between the purpose of limiting clauses in Articles 19(2) of the International Covenant on Civil and Political Rights (ICCPR)<sup>5</sup> and 10(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, (the ECHR)<sup>6</sup> on the one hand, and Article s 20(2) of the ICCPR and 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)<sup>7</sup>, on the other hand. While the purposes of the limitation clauses of the former articles are such matters as public policy or rights of others, the main purpose of the latter articles are protection of vulnerable ‘others’, which is similar to the purpose of all international and regional instruments on protection of vulnerable, for which affirmative measures have to be undertaken.

Finally, to protect security and peace worldwide, and in this line to address the shortcoming of legal bases of combating xenophobe, and to include all ‘others’ under the protection umbrella of anti-discrimination, anti-racism and anti-xenophobia struggle, the paper suggests exploring the concept of ethnoreligiosity to be replaced in the related human rights instruments, with merely ethnic (racial) or religion element.

## **2- Race, Religion and the Issue of Discrimination**

Article 55(c) of the Charter of the United Nations<sup>8</sup> commits all states to promote “universal respect for, and observance of human rights and fundamental freedoms for all, without discrimination as to race, sex, language or religion.” By the same token, the Universal Declaration of Human Rights (UDHR)<sup>9</sup> reiterates this fundamental principle in Article 2: “Everyone is entitled to all rights and

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5. International Covenant on Civil and Political Rights (ICCPR), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force, 23 March 1976.

6. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 213 U.N.T.S. 222, entered into force, 3 Sept. 1953, as amended by Protocols No. 3, 5, 8, and 11 which entered into force, 21 Sept. 1970, 20 Dec. 1971, 1 Jan. 1990, and 1 Nov. 1998 respectively.

7. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force, 4 Jan. 1969.

8. Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force, 24 Oct. 1945.

9. Universal Declaration of Human Rights (UDHR), G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948). For the text of Articles 2(1) and 26 of the ICCPR.

freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. "Similarly all states are committed under Articles 2(1), 24 and 26 the International Covenant on Civil and Political Rights (ICCPR)<sup>10</sup>, Articles 2(2) and 7(c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>11</sup> to non-discrimination policies towards all persons on their territory and subject to their jurisdiction on grounds such as race, colour, sex, language and religion.

On the other hand, among different grounds for discrimination, to compare the relevance of 'race' and 'religion' on the issue of 'discrimination' one can contrast the purposes of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)<sup>12</sup> with those of the Declaration on the Elimination of All Forms of Intolerance Based on Religion or Belief (the Religion Declaration).<sup>13</sup> 'Religion' unlike 'race', is itself a subject of rights which are known as 'religious rights'. Therefore, while the main purposes of the ICERD are prevention of 'discrimination on ground of race' and 'racial intolerance', the main purposes of the Religion Declaration are 'prevention of discrimination on ground of religion' and 'religion intolerance' along with an additional purpose which is 'protection of religious rights'. According to Capotorti:

Even if a state maintains strict neutrality as between various faiths, inequality of treatment is not necessarily excluded. The demands of various religions are different, and a law prohibiting certain acts, or enjoining the performance of others, may prevent one religious group from performing an essential rite or from following a basic observance, but be of no importance at all to another group.<sup>14</sup>

This issue of religious rights makes a study on the relevance of discrimination to religion more complicated. This is the main reason why -

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10. International Covenant on Civil and Political Rights (ICCPR), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force, 23 March 1976.

11. International Covenant on Economic, Social and Cultural Rights (ICESCR), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force, 3 Jan. 1976.

12. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force, 4 Jan. 1969.

13. Declaration on Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, G.A. res. 36/55, 36 U.N. GAOR Supp. (No. 51) at 171, U.N. Doc. A/36/684 (1981).

14. Francesco Capotorti, Special Rapporteur of the Sub-commission on Prevention of Discriminating and Protection of Minorities, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (Centre for Human Rights, Geneva, United Nations, New York, 1991), 47-48, (Capotorti Study).

while the ICERD is an almost universally accepted treaty against racial discrimination, which has been in force for more than 26 years, there is no international or regional binding instrument against religious based discrimination, apart from the non-binding Religion Declaration. This is despite the fact that the struggle against both kinds of discrimination had a common starting point in the history of the United Nations, as Ghana states:

The history of freedom of religion or belief and the elimination of racial discrimination were closely related in the early period. In the late 1940s and early 1950s, United Nations actions in the fields of racial and religious intolerance were not differentiated. This was only to occur after the end of the 1950s when acts of racial and religious intolerance, mainly in Europe, prompted separate and specific United Nations actions in each of these spheres. However, whilst the prohibitions of racial intolerance came to be enshrined in a convention as far back as 1965, the legal status of religious discrimination remains as a Declaration.<sup>15</sup>

Considering the complexity in the concept of religious based discrimination, as mentioned before, one should make a distinction between 'discrimination on ground of religion and beliefs' and 'discrimination between followers of different religions in their religious rights' (discrimination in religious rights). When the issue of minority rights is under question, a similar distinction can be made between discrimination on the grounds of identity and discrimination in identity rights. While the former discrimination, namely discrimination on the grounds of religion or identity is contrary to one of the basic universally accepted principles of human rights, the latter, namely, discrimination on religious rights or identity rights can fall subject to different states' policies and legitimate restrictions.

These two kinds of discrimination can also be called explicit or implicit discrimination or, as referred to by Weller, direct or indirect discrimination.<sup>16</sup> Also, as Krishnaswami, Special Rapporteur of the Sub commission on

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15. Nazila Ghana, "The Right to Freedom of Religion or Belief in International Human Rights Law and Inter-faith Dialogue", in *Collected Papers of the International Conference on Human Rights and Dialogue of Civilization* (Qom: Mofid University Publication Institute, 2001), 78. On the areas of overlapping between 'religious' and 'racial' discrimination see also, Amor, "Racial Discrimination and Religious Discrimination: Identification and Measures", presented at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance at Geneva, 15 May 2000, U.N. Doc.A/CONF.189/PC.1/7 (13 April 2000).

16. On direct and indirect religious discrimination see for example Paul Weller, "The Dimensions and Dynamics of Religious Discrimination: Findings and Analysis from the UK", in Nazila Ghana (ed.) *The Challenge of Religious Discrimination at the Dawn of the New Millennium* (Martinus Nijhoff Publishers, Leiden/Boston, 2003), 73-75.

minorities, has called them *de-jure* discrimination and *de-facto* discrimination. Direct or *de-jure* discrimination can loosely be called, as Krishnaswami notes, “traditional forms of discrimination.”<sup>17</sup> In the majority of countries although the law of the country, especially family law, is equally applicable to everyone, it reflects in certain important matters the concept of the predominant group. Krishnaswami, on the question of religious rights and practices, names this phenomenon the ‘*de-facto* pre-eminence’ of a religion:

There is no doubt that historically the principle of separation of state and religion emerged as a reaction against the privileged position of the established church or the state religion, and that its purpose was to ensure a large measure of equality to the members of various religions. Within the framework of this principle of separation, however, *de-facto* pre-eminence is sometimes achieved by a particular religion and the law of the country –although equally applicable to everyone– reflects in certain important matters the concept of the predominant group. Thus rules regulating marriage and its dissolution are often taken over from the religious law of the predominant group. Similarly, official holidays and days of rest in many countries correspond to a larger extent to the religious holidays and days of rest of the predominant group.<sup>18</sup>

The state, even when applying the principle of separation, may afford a special status to religious organizations, distinct from that granted to other kinds of associations. But such a status may be granted only on condition that the religious group satisfies certain special conditions – a possibility for some but not for others. By contrast a state may pass legislation with different restricting effects on different religious groups. The most controversial of this type of legislation was the ban on religious symbols which targets Muslim girls more so than others. On the relevant cases in European courts Carolyn states:

One issue that has caused conceptual difficulties in other jurisdictions that deal with religious freedom but has not been discussed in any detail by the Commission or Court is the interaction between neutral and generally applicable laws and freedom of religion or belief. This is not because of a lack of cases dealing with the issue, but rather because neither the Court nor the

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17. Arcot Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practices* (NY: United Nations Publication, Sales No.60.XIV.2, 1960), 57.

18. Krishnaswami, *Study of Discrimination*, 47-48.

Commission has given sophisticated consideration to such cases as a distinct group. The general and neutral law problem arises when a state passes legislation that does not on its face mention religious issues or appears to discriminate against a religious group. Sometimes this neutral appearance is deceptive and the law can either have been passed with the intention of curtailing the religious practices of a particular group or is enforced or applied in a discriminatory manner. These cases merely create the impression of laws that are general and neutral but the reality is otherwise and no particular problem arises in determining that they interfere with religion or belief.<sup>19</sup>

Capotorti also refers to another similar concern with regard to the customs of minority groups with inferior positions in Europe:

The available information further reveals that some minority groups, in particular those which occupy an inferior position in the society in which they live, confront severe problems in their efforts to maintain their customs. The situation of the Gypsies in Europe and of the indigenous population in various countries is illustrative of that point.<sup>20</sup>

Articles 8 and 12 of the Constitution of Malaysia refer to these two kinds of discrimination. Article 8 prohibits discrimination on the grounds of religion among others:

(1) All persons are equal before the law and entitled to the equal protection of the law.

(2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent or place of birth in any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.<sup>21</sup>

While Article 12 (1) is similar to Article 8 in that it reiterates the principle of non-discrimination on the grounds of religion, Article 12(2) finds it lawful

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19. Carolyn Evans, *Freedom of Religion under the European Convention* (Oxford/NY: Oxford University Press, 2001), 168. For more information about discriminatory natural laws in Europe also Evans, *Freedom of Religion*, 118, 119, 125, and 130, 131. On the European approach towards the two kinds of discrimination, Michael Ippgrave, "Religious Freedom: A Christian Perspective from Britain", in *Collected Papers of the International Conference on Human Rights and Dialogue of Civilization* (Mofid University Publication Institute, Qom-Iran, 2001).

20. Capotorti, *Study on the Rights of Persons*, 67.

21. Constitution of Malaysia, 31 Aug. 1957, amended 16 Sept. 1963.

for the Federation or a state to provide special supports for Muslim institutions. The Article reads as follows:

(1) Without prejudice to the generality of Article 8, there shall be no discrimination against any citizen on the grounds only of religion, race, descent or place of birth -

(a) In the administration of any educational institution maintained by a public authority, and, in particular, the admission of pupils or students or the payment of fees; or

(b) In providing out of the funds of a public authority financial aid for the maintenance or education of pupils or students in any educational institution (whether or not maintained by a public authority and whether within or outside the Federation).

(2) Every religious group has the right to establish and maintain institutions for the education of children in its own religion, and there shall be no discrimination on the ground only of religion in any law relating to such institutions or in the administration of any such law; but it shall be lawful for the Federation or a state to establish or maintain or assist in establishing or maintaining Islamic institutions or provide or assist in providing instruction in the religion of Islam and incur such expenditure as may be necessary for the purpose.<sup>22</sup>

With regard to the instances of provisional measures in favour of minorities, according to General Comment 23, “as long as those measures are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under Article 27, they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria.”<sup>23</sup> It should be noted that this kind of different treatment or so-called ‘positive discrimination’ is justified in cases of indirect discrimination and not direct discrimination.

Finally, it also should be added that recognition of some religious groups and non recognition of some others is an issue of discrimination in identity rights and might be justifiable. Yet, if such recognition or non recognition leads to discrimination on the grounds of identity or even the ignoring of some

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22. Constitution of Malaysia, 31 Aug. 1957, amended 16 Sept. 1963.

23. Human Rights Committee, General Comment 23, Article 27 (Fiftieth session, 1994), U.N. Doc. CCPR/C/21/Rev.1/Add.5 (1994), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 158 (2003), para. 6.2.

fundamental rights of non-recognized minorities, it should be prohibited, as it leads to the violation of the basic principles of human rights.

### **3- Offences against Religion and Religious Hatred Speech**

The legitimacy of limitations on freedom of expression, particularly when it overlaps with the issue of religious rights, has been a controversial issue. Article 19(1) of the ICCPR states: “Everyone shall have the right to hold opinions without interference.” According to the Human Rights Committee General Comment 10: “This is a right to which the Covenant permits no exception or restriction.”<sup>24</sup> On the other hand, every one is free to express his opinions. According to Article 19(2) of the ICCPR: “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

Unlike freedom of opinion, freedom of expression is subject to responsibilities and duties and therefore subject to limitations. According to Article 19(3) of the ICCPR: “The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions.” According to the same article these limitations, however, “shall only be such as are provided for by law and are necessary: (a) For the respect of the rights or reputations of others; (b) For the protection of national security or public order (order public), or of public health or morals.”<sup>25</sup> There is a similar limitation clause for freedom of expression in Article 13(2) of American Convention on Human Rights<sup>26</sup> and Article 10(2) of the European Convention on Human Rights. The limitation clause in the European Convention provides more grounds for limitations than does Article 18(2) of the ICCPR:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary

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24. Human Rights Committee, General Comment 10, Article 19 (Nineteenth session, 1983), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 132 (2003).

25. Human Rights Committee, General Comment 10, Article 19 (Nineteenth session, 1983), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 132 (2003).

26. The American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force, 18 July 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

It is a common policy among the majority of states to pass legislation on insulting religions and religious feelings. Some Muslim states have incorporated such restricting measures either in their Press Code and/or Penal Code. As an example from a Muslim state, Article 160(3) of the Penal Code of Algeria provides penalties for those who deface, destroy or profane any places of worship whatsoever, and Article 160(4) provides penalties for those who mutilate, destroy or defile “monuments, statues, pictures or other objects that may be used for the purposes of religious worship.” Likewise, Article 77 of the Act of 3 April 1990 on information provides penalties for anyone who, in writing, or by sounds, images, drawings or any other direct or indirect means, offends against Islam and the other celestial religions.<sup>27</sup>

Religious related limitations against freedom of expression in some European states are found in laws against blasphemy or insulting religion.<sup>28</sup> As an example, Austrian law reads as follows:

Whoever, in circumstances where his behaviour is likely to arouse justified indignation, disparages or insults a person who, or an object which, is an object of veneration of a church or religious community established within the country, or a dogma, a lawful custom or a lawful institution of such a church or religious community, shall be liable to a prison sentence of up to six months or a fine of up to 360 daily rates.<sup>29</sup>

The following definition of blasphemous libel in the UK was given by the trial judge in the case of *Whitehouse v. Lemon* (The Gay News case), “Blasphemous

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27. Human Rights Committee: Consideration of Reports Submitted by States Parties, Second periodic report (Algeria), para.160, U.N. Doc. CCPR.C.101.Add.1 (18 May 1998). The legislation of Iran and Pakistan will be discussed in section 3.1 of this book. For another example see Article 103 of 1990 Yemen Law on the Press and Publications, Law No 25, signed in Dec. 1990.

28. Such laws still exist in legislation of several Western countries, such as in Austria (Articles 188, 189 of the criminal code), Finland (Section 10 of Chapter 17 of the penal code), Germany (Article 166 of the criminal code), Ireland (Article 40/6.1.i of the Constitution), The Netherlands (Article 147 of the criminal code), Spain (Article 525 of the criminal code). Yet, there has been a tendency in Western countries towards the repeal or reform of blasphemy laws, and these laws are only infrequently enforced where they exist.

29. Section 188 of Austrian Penal Code, reprinted in Otto-Preminger, 295 Eur. Ct. H.R. (Ser. A) at 12.

libel is committed if there is published any writing concerning God or Christ, the Christian religion, the Bible, or some sacred subject, using words which are scurrilous, abusive or offensive and which tend to vilify the Christian religion (and therefore have a tendency to lead to a breach of the peace.)<sup>30</sup>

While the Austrian blasphemy law criminalizes insulting against all recognized religions, in the United Kingdom, as well as in some other Western and Muslim countries, the subject of blasphemy law is only insulting the dominant religion. The European Commission has stated that the “main purpose” of the English common law offence of blasphemous libel is “to protect the rights of citizens not to be offended in their religious feelings.”<sup>31</sup> However, the *Rushdie* case supported an opposite view. Members of the Muslim community in Britain referred the case of *Rushdie* to court in order to complain about the blasphemies in the Satanic Verses. The complaint was dismissed for the reason that the protection provided by English blasphemy law is only to the Church of England, and in some respects to Christianity as a whole.<sup>32</sup> The European Court of Human Rights also refused the case, saying that there was no positive obligation for the UK to protect Muslims from blasphemy.<sup>33</sup>

Similarly, blasphemy law in Massachusetts only addresses Christianity. Section 36 of Chapter 272 of the Massachusetts General Laws reads as follows:

Whoever wilfully blasphemes the holy name of God by denying, cursing or contumeliously reproaching God, his creation, government or final judging of the world, or by cursing or contumeliously reproaching Jesus Christ or the Holy Ghost, or by cursing or contumeliously reproaching or exposing to contempt and ridicule, the holy word of God contained in the holy scriptures shall be punished by imprisonment in jail for not more than one year or by a fine of not more than three hundred dollars, and may also be bound to good behaviour.<sup>34</sup>

Article 20 of the ICCPR introduces a new area for limitations against

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30. *R. v. Lemon, R. v. Gay News Ltd.* Central Criminal Court, 11 July 1977 (transcript, p.9), quoted in Great Britain, Law Commission, *Offences against Religion and Public Worship* (London: H.M.S.O., 1981), 2-3.

31. *Gay News Ltd. v. United Kingdom*, 5 Eur. H.R. Rep. 123, P11 (1983) (Commission report).

32. *R. v. Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury*, 1 All E.R. 306 (Q.B. 1991). Also quoted in *Wingrove v. United Kingdom*, 24 EHRR (1997) 1, para. 28.

33. The European Commission determined that the protection provided by English blasphemy law only to Christianity, was not discrimination on the grounds of religion in violation of Art. 14 of the European Convention. See *Choudhury v. U. Kapplition* No.17439/1990 reprinted in 12 Hum. R. L. J. 172-73 (1991).

34. Wikipedia, The Free Encyclopaedia, available at: <<http://www.reference.com/browse/wiki/Blasphemy>>.

freedom of expression. It also obliges states to adopt legislative measures against such expressions. The article reads as follows: “1. any propaganda for war shall be prohibited by law. 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

In the ECHR there is no article similar to Article 20 of the ICCPR, but Article 13(5) of American Convention on Human Rights is equivalent to it. Article 13(5) of the American Convention reads as follows: “Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, colour, religion, language, or national origin shall be considered as offences punishable by law.” However, “while Article 13(5) requires the prohibition of advocacy that constitutes incitement to violence, Article 20 of the ICCPR requires the much broader prohibition of advocacy that constitutes incitement to discrimination, hostility or violence.”<sup>35</sup> Nevertheless the American Convention offers protection to a broader range of groups than Article 20, as indicated in Article 13(5), which states, “the enumerated grounds for protection are illustrative only.”

Finally it should be noted that despite the earlier drafts of the Religion Declaration, it contains no similar article to that of Article 20(2) of the ICCPR on religious hatred, as Boyle states:

Although the 1981 [Religion] Declaration couples intolerance with discrimination in its title, it is primarily concerned with the question of discrimination. Thus it has no clause equivalent to Article 4 of the ICERD Convention on incitement to religious discrimination or hatred, although in other respects it follows the structure of that treaty. The draft Convention and early drafts prepared by the Sub-commission of what became the 1981 [Religion] Declaration did have an anti- incitement clause.<sup>36</sup>

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35. Jonna Oyediran, “Article 13(5) of the American Convention on Human Rights”, in *Striking a Balance: Hate Speech, Freedom of Expression and Non- discrimination, Article 19*, edit. Sandra Coliver (London: Human Rights Centre, University of Essex, 1992), 33.

36. Kevin Boyle, “Religious Intolerance and the Incitement of Hatred”, in *Striking a Balance: Hate Speech, Freedom of Expression and Non- discrimination, Article 19*, edit. Sandra Coliver (London: Human Rights Centre, University of Essex, 1992), 64. For further information on the issue of religious hatred speech on Draft Convention and Draft Declaration See: Boyle, “Religious Intolerance and the Incitement of Hatred”, 64-65.

Article 4 of the ICERD Convention reads as follows:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.”

The main purpose of Article 20(1) and Article 20(2) have a major purpose equivalent to Article 4 of the ICERD, which is protection of vulnerable ‘others’ to live free from fear. In this sense, it is similar to the purposes of provisions of other international and regional instruments on protection of vulnerable peoples, for which affirmative measures have to be undertaken. These purposes are different from ‘rights of others’ or ‘public order’ under Article 19(3) of the ICCPR, or other limitation clauses in international and regional instruments.

However, according to Boyle, “while this obligation [in the Article 20] should constitute an adequate international guarantee, comments made by [the Human Rights] Committee members suggest that many countries do not appear to take their obligations under Article 20 seriously.”<sup>37</sup> In other words, those states which have not resorted to affirmative measures against religious hatred will continue to be in breach of their international obligations under Article 20(2).

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37. Boyle, “Religious Intolerance and the Incitement of Hatred”, 65.

Finally, there are many more circumstances under Articles 19(3) and Article 20 of the ICCPR in which freedom of expression can be circumscribed than there are under the limitations against freedom of religion under Article 18(3) of the ICCPR. However, when freedom of religion overlaps with freedom of expression, those restrictions against the latter might encroach upon the former. In this sense, the provision of Article 20 is reiterated in the Human Rights Committee General Comment 22 on freedom of religion: "In accordance with Article 20, no manifestation of religion or belief may amount to propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence."<sup>38</sup>

#### **4- Overlapping Areas of Elements of Race and Religion and the Concept of Aggravated Discrimination**

There are wide overlapping areas between different types of identities. For instance, with regard to 'religious identity', where the example of Islam is concerned, this identity sometimes is combined or attached to 'ethnicity'. According to Article 160(2) of the Constitution of Malaysia, "'Malay' means a person who professes the religion of Islam, habitually speaks the Malay language, and conforms to Malay custom . . ."<sup>39</sup> Also, in most Muslim countries, similar to non-Muslim countries, religion is considered a part of the national identity and/or cultural identity.

In Egypt "Makram Ebeid, a Coptic nationalist leader in the interwar years, liked to say that 'Christianity is my religion, but Islam is my culture.'<sup>40</sup> However, unlike the Christian Copts in Egypt or in the north of Sudan, Christians in the south of Sudan have been in a minority-majority or south-north conflict with Muslims over previous decades that is in fact a conflict between different identities, as Ronen concludes:

[It is] essentially a struggle between two starkly different societies to define the state's identity and, as far as the south is concerned, to maintain its own in the face of the rising tide of Islam... It could be defined as a struggle between Africanism and Arabism... Nevertheless, the religious components of identity [are] central to both.<sup>41</sup>

38. General Comment No. 22, para. 7.

39. Constitution of Malaysia, 31 Aug. 1957, amended 16 Sept. 1963.

40. Philippe Fargues, "Demographic Islamization: Non-Muslims in Muslim Countries", *SAIS Review* 21, no. 2 (2001): 103-116. On situation of religious minorities during Ottomans also see Bruce Masters, *Christians and Jews in the Ottoman Arab world* (New York: Cambridge University Press, 2001).

41. Yehudit Ronen, "Religion and Conflict in Sudan: A Non-Muslim Minority in a Muslim State", in *Minorities and the State in the Arab World*, edit. Orfa Bengio & Gabriel Ben-Dor, (Denver: Lynne Rienner Publishers, 1999), 85.

Similarly it is not clear whether European Jews are a religious or an ethnic minority, or incorporate elements of both. In a similar vein, it has been an issue of political and legal struggle by Muslim minorities in the United Kingdom that 'the Race Relations Act' of 1976, affords protection just to Jews and Sikhs as ethnic groups, but not to members of other religions.<sup>42</sup> The same overlap exists for Bosnians, where the International Criminal Tribunal for the Former Yugoslavia has been perplexed about how to define the victims of the Serb 'genocide': 'Muslims', 'Bosnian Muslims', etc.<sup>43</sup>

It is worth mentioning that a comprehensive study on the issue has been presented in 2000 by Abdelfattah Amor, the former UN Special Rapporteur on religious intolerance, to a world conference against racism, racial discrimination, xenophobia and related intolerance at Geneva. The report which introduces the concept of aggravated discrimination states that:

There are borderline cases where racial and religious distinctions are far from clear-cut. Apart from any discrimination, the identity of many minorities, or even large groups of people, is defined by both racial and religious aspects. Hence, many instances of discrimination are aggravated by the effects of multiple identities.<sup>44</sup>

### **5- Race, Religion and Human Rights Struggle for Protection of Vulnerable**

International struggle for protection of minorities has had two main approaches. The first and the older one is security approach for protection of security of minorities and their right to life. This approach is based predominantly on reciprocity of states. This is evident in the phenomenon amongst European (and some non-European) states of recognition of minorities based on bilateral or multilateral treaties. For example, at the end of

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42. The text of The Race Relations Act 1976 and the Race Relations (Amendment) Act 2002 is available at: <[www.homeoffice.gov.uk/docs/racere11.html](http://www.homeoffice.gov.uk/docs/racere11.html)> and <[www.hmso.gov.uk/si/si2003/20031626.htm](http://www.hmso.gov.uk/si/si2003/20031626.htm)>. With regard to the British Muslims' views on this issue, see for example an interview by the Secretary General of the Muslim Council of Britain(MCB), available at: <[www.muslimnews.co.uk/news/news.php?Article=8153](http://www.muslimnews.co.uk/news/news.php?Article=8153)>.

43. *Prosecutor v. Radislav Krstic* [2004] ICTY 7 (19 April 2004), Case No: IT-98-33-A, *Prosecutor v. Blagojevic*, [2001] ICTY 10 (9 Oct. 2001), Case No. IT-02-60-PT, etc. For a comprehensive study on the areas of overlapping between 'religious' and 'racial' discrimination see Abdelfattah Amor, Special Rapporteur of the Commission on Human Rights, 'Racial Discrimination and Religious Discrimination: Identification and Measures', presented at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance at Geneva, 1-5 May 2000, U.N. Doc.A/CONF.189/PC.1/7 (13 April 2000).

44. Abdelfattah Amor, Special Rapporteur of the Commission on Human Rights, 'Racial Discrimination and Religious Discrimination: Identification and Measures', presented at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance at Geneva, 1-5 May 2000, U.N. Doc.A/CONF.189/PC.1/7 (13 April 2000).

the First World War based upon the peace treaties of Versailles, Saint German, Trianon and Neuilly, five special treaties of minority protection were concluded between Poland, Czechoslovakia, Romania, Yugoslavia and Greece respectively, on the one hand, and the allied and associated powers on the other. Very similar provisions were directly included in the peace treaties of Saint German (with Austria), Trianon (with Hungary), Neuilly (with Bulgaria) and Lausanne (with Turkey). Between 1919 and 1940, sixteen countries undertook international obligations on the protection of minorities.<sup>45</sup>

Similarly, after the Second World War, in the agreement between Austria and Italy in Paris, September 1946, 'German-speaking inhabitants' of the Bolzano province and of neighbouring bilingual townships were granted a number of rights. In addition, a special autonomy, comprising legislative and administrative powers, was provided for the province of Bolzano, where German-speaking citizens constituted the majority of the population. Also the Memorandum of Understanding between the government of Italy, the UK, the US and Yugoslavia, in London 1954, regarding the free territory of Trieste was signed to safeguard the 'Yugoslav ethnic group' in the Italian-administrated area and the 'Italian ethnic group' in the Yugoslav-administrated area.<sup>46</sup>

The Second and recent approach is the human rights approach and its main focus is on the issue of non-discrimination and the rights of minorities to identity. However, there is no doubt that without providing for the minorities the right to live free from fear, their right to non-discrimination and identity is meaningless. On the other hand in the time of so-called clash of civilizations, and particularly in the critical situations for Muslim minorities in the aftermath of the September 11, the international community should again have more focus on protecting the security of minorities and more concerned about the element of religion in its struggle.

One of the reports of the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Doudou Diène on Danish Cartoons elaborates more on one of the most serious examples

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45. Tore Modeen, 'The International Protection of National Minorities in Europe' (Abo: Abo Akademi, 1969) p. 182, available at Iranian Student News Agency at : <[http://www.isn.ethz.ch/5isf/5/Papers/Buchsbaum\\_paper\\_III.4.pdf](http://www.isn.ethz.ch/5isf/5/Papers/Buchsbaum_paper_III.4.pdf)>.

46. For similar treaties see for example agreement between India and Pakistan, New Delhi , 8 April 1950; the Austrian State Treaty for the Re-establishment of the Independent and Democratic Austria, Vienna , 15 May 1955; Agreement between the UK and Singapore, London, March-April 1957; Memorandum for the final settlement of the problem of Cyprus, London, Feb. 1959; Unilateral Declarations of Germany and Denmark of 1955 on German and Danish minorities; The Government Declarations of France and Algeria on protection of Algerians of French civil status, 19 May 1962, Algeria, Capotorti, *Study on the Rights of Persons*, 12-13.

of this critical situation. Diène finds that “the cartoons illustrated the increasing emergence of the racist and xenophobic currents in everyday life.”<sup>47</sup> He also stresses the political atmosphere in Denmark which contributed to a “context of the emergence of strong racist, extremist political parties and a corresponding absence of reaction against such racism by the country’s political leaders.”<sup>48</sup>

Diène emphasizes his criticism of the government’s actions by referring to the “national and political backdrop to the cartoons”, in which the government had signed an accord with the far-right Danish People’s Party. He quotes a spokesman of the Danish People’s Party, Soren Krarup, who had said that “Muslim immigration is a way for Muslims to conquer us, just as they have done 1,400 years past.”<sup>49</sup> He notes “the increasing prominence of far-right racist and xenophobic platforms in the political programs of traditionally democratic parties”.<sup>50</sup>

The report links in to the earlier document which examined not only Islamophobia, but anti-Semitism and Christianophobia. It notes that “the criticism of the cartoons by Jewish and Christian community leaders indicates, first of all, a deeply-held belief that the cartoons exemplify the increasing trend to defame all religions and the prevailing ideological climate of intolerance towards religion itself and religious practices.” In conclusion, he identifies underlying causes for increasing Islamophobia, “as symbolized by the cartoons of the Prophet Muhammad in a Danish newspaper”: the precedence of political and ideological considerations over religious factors; the general increase in defamation of religions; the worldwide crisis of identity; and the inadequacy of international law, particularly international instruments on human rights and combating racism and discrimination, in matters of religion. Diène in another report cites racism and xenophobia, rather than terrorism, as “the most serious threats to democracy”.<sup>51</sup>

The Special Rapporteur on racism, in line with his previous writings notes: “the increasing trend in defamation of religions cannot be dissociated from... the ominous trends of racism, racial discrimination, xenophobia and related intolerance which in turn fuel and promote racial and religious hatred.

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47. UN News Centre, ‘Racism and Racial Discrimination on Rise Around the World, UN Expert Warns’, 7 March 2006, available at: <http://www.un.org/apps/news/story.asp?NewsID=17718&Cr=racis&Cr1>

48. UN News Centre, ‘Racism and Racial Discrimination on Rise Around the World, UN Expert Warns’, 7 March 2006, available at: <http://www.un.org/apps/news/story.asp?NewsID=17718&Cr=racis&Cr1>

49. UN Doc. E/CN.4/2006/17, ‘Situation of Muslims and Arab Peoples in Various Parts of the World’, Section III – ‘The Cartoons of the Prophet Muhammad published in a Danish Newspaper’, paragraph 26.

50. UN Doc. E/CN.4/2006/17, ‘Situation of Muslims and Arab Peoples in Various Parts of the World’, Section III – ‘The Cartoons of the Prophet Muhammad published in a Danish Newspaper’, paragraph 26.

51. UN Doc. A/HRC/2/3, ‘Incitement to Racial and Religious Hatred and the Promotion of Tolerance’, 20 September 2006.

Diène notes “the centrality of the amalgamation of the factors of race, culture and religion in the post-9/11 ideological atmosphere of intolerance and polarization.” This atmosphere “favors the incitement to racial and religious hatred... [and] is indicated by the latest controversies about the caricatures of the Prophet Muhammad published by the *Jyllands-Posten* newspaper in Denmark.”<sup>52</sup>

## 6- Conclusion

To sum up, the only distinction that can be made between religion and race in human rights instruments is when the issue of discrimination in religious rights is concerned; in other areas the purpose of the related human rights documents are the same and the elements of race and religion are interchangeable.

In fact the concept of aggravated discrimination raised by Amor is also insufficient for the purpose of protecting vulnerable, as there are cases where discrimination imposed is purely religious. To address this shortcoming of legal bases of combating xenophobia and to include all ‘others’ under the protection of anti-racism and anti-xenophobia struggle, one may suggest exploring the concept of ethnoreligiosity to be replaced with merely ethnic (racial) or religious element . Paul Gordon states:

“Anyone who is considered an ‘other’ can be the object of racist violence whether this is on grounds of skin colour, ethnic origin, religion or culture. Frequently, of course, such grounds merge, as in the case of Arabs who may be attacked because of their religion, their ethnicity or their skin colour, or Jews who may be seen as both culturally and religiously different. One should not look for pure grounds for such hate, but accept that many groups are in practice vulnerable to the expression of what might loosely call ‘race hate’. In Europe at the present moment such groups include migrant workers and their families, refugees and asylum – seekers, Muslims, Jews and gypsies.”<sup>53</sup>

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52. UN Doc. A/HRC/2/3, ‘Incitement to Racial and Religious Hatred and the Promotion of Tolerance’, 20 September 2006.

53. Paul Gordon, “Racist Violence: The Expression of Hate in Europe”, in *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination*, edit. Sandra Coliver, (Colchester: University of Essex, 1992), 9-10.

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