Dipartimento di Giurisprudenza
Università degli Studi di Ferrara

Centro studi giuridici europei
sulla grande criminalità

YADH BEN ACHOUR

THE ISLAMIC QUESTION BEFORE THE UNITED NATIONS HUMAN RIGHTS COMMITTEE

ACHOUR THE ISLAMIC QUESTION

ISBN
9 788824 327077

€ 14,00

Jovene editore
2021

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DIRITTI D'AUTORE RISERVATI
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ISBN 978-88-243-2707-7

JOVENE EDITORE
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Printed in Italy Stampato in Italia

To my friend Orsetta Giolo,
professor at the University of Ferrara,
who gave me the opportunity to write these pages.

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PREFACE

A VALUABLE DIALOGUE

We have the honour and pleasure to inaugurate the *Macrocrimes Centre*'s series with the publication of Yadh Ben Achour's *The Islamic Question before the United Nations Human Rights Committee*.

The *Macrocrimes Centre - Centre for European Legal Studies on Macro-Crime was* founded in 2018 at the University of Ferrara's Department of Law with the aim of developing collaborative networks among scholars, bodies, and institutions active in the field of countering "macro-crime" and protecting fundamental rights at the national, European, and international level. The Centre regularly organises research and in-depth teaching activities on these topics, in the form of lectures and advanced training seminars.

In November 2020, in the midst of the COVID-19 pandemic, the Macrocrimes Centre organised a series of online seminars on one of the main issues affecting the implementation of rights on a global scale today, with reference to the dialogue between legal heritages and cultural traditions. The lecturer was Yadh Ben Achour, who gave six lectures on *The Islamic Question before the United Nations Human Rights Committee*, of which this volume contains a richly reworked version.

Yadh Ben Achour is a world-renowned intellectual and jurist. A university lecturer and author of numerous monographs on the Arab-Islamic legal and political tradition, human rights, and dialogue between civilisations, his work has been translated into several languages. He has held many important positions in international institutions and organizations. In particular, we would like to mention some of his recent commitments to help put the reflections collected herein in perspective.

Following the Tunisian Revolution in 2011, Ben Achour played a key role in the country's democratic transition and in the reaffirmation of fundamental rights and freedoms in the Tunisian legal and po-

litical sphere, chairing the *Haute instance pour la réalisation des objectifs de la révolution, de la réforme politique et de la transition démocratique*.

Subsequently, his appointment as a member of the UN Human Rights Committee in 2012 saw him devote himself even more specifically to analysing the theory and practice of human rights in their interaction with different cultural heritages and, in particular, with the Arab-Muslim legal tradition.

The text published here is therefore of particular relevance, due to the author's highly prominent standing and to the peculiarities of a topic that is extremely important from both a theoretical-legal and a practical-application point of view.

As stated in the Introduction, the "Islamic question" refers to multiple problems that go beyond the religious dimension and delves into legal, political, and social aspects of the internal complexity of Islam and Muslim countries. At the same time, the discussion of how this issue was analysed before the Human Rights Committee allows us to deal with the issue in a decidedly original way compared to what usually happens in public debate and scholarly literature – instead of limiting ourselves to in-depth theoretical studies, the investigation is placed in the context of the international community and its bodies, as well as the dialogue between public institutions and different legal and cultural heritages.

In this respect, Ben Achour's expertise in internationalism and legal philosophy is particularly enlightening: his unique ability to combine both perspectives lends the work considerable depth, providing an incredibly broad horizon of reflection.

We are therefore grateful to our friend and colleague Yadh Ben Achour for having honoured us with his collaboration and for having consented to the publication of his work in the *Macrocrimes Centre* series, in the certainty that together we have created a significant opportunity for discussion and in-depth study of these crucial issues. We sincerely hope that we can continue this valuable dialogue together.

Ferrara, March 2021

ORSETTA GIOLO

INTRODUCTION

The title chosen for this study, "The Islamic Question", is intended to emphasize the multiple facets and complex nature of the problem. It goes beyond Islam as a religion and belief system. The aim is to examine the positions of the United Nations Human Rights Committee on the laws and practices of Muslim countries, both in their religious dimensions and through their social, legal and political aspects. The issue affects Islam, Islamic states and Muslims, all at the same time. This is not a simple religious issue, which would bring Islam and human rights face to face, nor a simple matter of doctrine[1]. This complexity also stems from the many issues, interests and conflicts that Islam brings before international litigation bodies, notably the Human Rights Committee: conflicts between Muslims and Muslims themselves, between revealed law and secular law, between human rights and God's rights, between the *Text*[2] of Islam and customary practices, between Sharia and modern law, between cultural specificities and universality.

In general, when a Muslim State is examined by the Committee, these issues come together and put the Committee in a unique position with the State Party to the 1966 Covenant on Civil and Political Rights. Indeed, the members of the Committee, including members who are Muslims or of Islamic culture, share a common democratic and liberal legal culture, coupled with a broad conception of human rights. They are experts, magistrates, academics, lawyers, human rights defenders, sometimes diplomats, familiar with the international human rights environment which revolves around the United Nations system, international law and Western legal traditions or the democratically interpreted Islamic tradition.

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[1] The topic of Islam and human rights has been the subject of an abundant literature. By way of an example: Gérard Conac and Abdelfatah Amor, *islam et droits de l'homme [Islam and Human Rights]*, Economica, 1994 and the works of Mohamed Amin al Midani cited below.

[2] By *Text* (capitalized and italicized) I mean all the sacred writings (Koran and Sunna) constituting the moral or legal norms of Islam, as well as their interpretation enshrined in doctrine.

This point, which is often consciously or unconsciously obscured, is a kind of disconnect between the Committee and a number of conservative Muslim states. The latter, without expressly saying so, generally view the system of human rights protection, particularly that of the Committee, as a partly Western extractive system, hostile to Islamic conceptions of man, earthly society, politics and law.

First of all, there is the question of principle: what role and what place should be accorded to revealed or sacralised law in relation to the system of law on which the philosophy of human rights is based and which the Committee practises? On the major issues of the relationship between religion and the State in constitutional systems, the criminalisation of apostasy and blasphemy, polygamy, repudiation, corporal punishment, abortion, the freedom of sexual minorities, women's rights, freedom of belief and conscience, the death penalty, the representatives of Muslim States before the Committee, with very few exceptions, maintain culturalist, identity-based and defensive positions. The reservations some Muslim States have about the Covenant and the objections to these reservations, which will be discussed below, are a significant testimony to this.

As for the Committee, it reacts to the Islamic question from two angles. First of all, its position towards Islam, as a religion and community of believers, is protective. This means that Islam must be accorded the status of a protected religion, essentially under Article 18 of the Covenant. On the other hand, however, given that some Islamic States are far from sharing the general philosophy and legal principles that inspire the philosophy of human rights "in their unity, universality and interdependence", the Committee is led to censor Islamic legislation or social and political behaviour practised in certain States that is contrary to the provisions of the Covenant, which accentuates this situation of discrepancy.

There are major points of friction between the predominant Islamic understanding of rights and law and modern human rights[3]. First of all, the philosophy of the world and of life in Islam and in the philosophy of human rights are not in a state of obvious harmony, contrary to what is sometimes said. To make them compatible, it is necessary to adopt an "intellectual" attitude, with this culture of metaphysical uncertainty which is far from being shared by the vast majority of Muslims. Muslims build both their faith and their social norms on certain principles, free from metaphysical perplexity. On the other hand, the philosophy of hu-

[3] Michel Levinet, *Théorie générale des droits et libertés [General Theory of Rights and Freedoms*], 3rd edition, Bruylant, 2010, p. 309.

man rights, even as a believer, proceeds to a kind of eclipse of God, at least in the world of law and the State. The theory of law in Islam gives prevalence to the God's certain and absolute rights over human rights[4]. In the theology and doctrine of law in Islam, there is an extremely dense and complex theory on the rights of God *(huqûq Allah)* from which human rights *(huqûq al insân)* can only be derogated in exceptional cases. A comparison between the spirit and method of drafting the Universal Declaration of Human Rights and the Covenant on the one hand and Islamic declarations, such as the Dhaka Declaration on Human Rights in Islam of December 1983[5] or the Declaration of Human Rights in Islam (Cairo, 5 August 1990) on the other, is quite eloquent in this regard. In the latter declaration, the believing and creationist reference to human rights in the preamble and in Articles 1, 2 and 10 (with the notion of "religion of true unspoiled nature" in Article 10), Articles 5, 6 and 7 on the family, women and children, the prevalence of Sharia law in Articles 19, 22, 24 and 25[6], are not particularly compatible with the modern philosophy of human rights which generally inspires the Committee.[7]

The historical roots of the Covenant can be traced back to the Universal Declaration of Human Rights of 1948, which is historically rooted in the great founding texts such as the Bill of Rights of 1689, American declarations, notably the Declaration of Independence of 4 July 1776, the French Declaration of 1789, South American declarations, notably

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[4] Yadh Ben Achour, *La deuxième Fâtiha; L'islam et la pensée des droits de l'Homme [The Second Fatiha; Islam and Human Rights Thinking]*, PUF, Collection Proche Orient, 2011.

[5] Adopted by the Fourteenth Conference of Foreign Ministers of the O.I.C. (6-11 December 1983) in Dhaka, Bangladesh, December 1983. See the text of this Declaration in Mohammed Amin Al Midani, *Human Rights and Islam. Texts from Arab and Islamic Organisations*. Preface by Jean-François Collange, Association des Publications de la Faculté de Théologie Protestante, Université Marc Bloch, Strasbourg, 2003.

[6] Mohammed Amin AL-Mdani, "La Déclaration universelle des Droits de l'Homme et le droit musulman [The Universal Declaration of Human Rights and Muslim Law]", in *Lectures contemporaines du droit islamique. Europe and the Arab world*. Robert Schuman University Collection, Society, Law and Religion in Europe, Presses Universitaires de Strasbourg, Strasbourg, 2004. Mohammed Amin Al-Midan, 'Is the Cairo Declaration on Human Rights in Islam in conformity with the Universal Declaration of Human Rights', *Revue Egyptienne de Droit International*, vol. 60, 2004, pp. 31-43.

[7] On this issue, see the work of Mohamed Amin al Midani, in particular, *Introduction to Islam and Human Rights: 2nd revised and expanded edition*, European University Editions, 2017. "The contribution of the organisation of Islam cooperation in protecting human rights in Arab-Muslim states (quote translated by translator, original in French only)", in Mustapha Afroukh (dir.), *L'islam en droit international des droits de l'homme [Islam in International Law of Human Rights]*, Institut Universitaire Varenne, 2019, p. 177.

the American Declaration of the Rights and Duties of Man adopted in Bogotá, Colombia, on 2 May 1948 by the Ninth Conference of the Organisation of American States, and finally the European Convention on Human Rights of 1950. To get an idea of the essential differences between human rights in Islam and in the European philosophical and cultural tradition that inspired the Universal Declaration, one could refer to the testimony of an international court, such as the European Court of Human Rights. Although the case law of the court is not within the scope of our study, we consider it here simply as a testimony, because it reflects a non-Muslim and synthetic point of view on the issue. We will use the case of *Reffah Partisi v. Turkey*, decided by the European Court of Human Rights on 13 February 2003.[8]

The dissolution of the Welfare Party *Refah* was pronounced by the Turkish Constitutional Court in February 1998. This court also decided to disqualify a number of Refah leaders from their positions as members of parliament. The European Court of Human Rights will rule on the main stumbling blocks between Sharia law and human rights, in particular the establishment of a confessional system and the priority application of Sharia law, by means of petitions against the decisions of the Constitutional Court.

On the first point, the Court considers that the confessional system, by suppressing the role of the State and of the single law that is equal, is contrary to the principle of non-discrimination. On the second point, the Court states:

> It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts. … In the Court's view, a political party whose actions seem to be aimed at introducing sharia in a State party to the Convention can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention.

These two general ideas clearly highlight the main fault lines between the two systems. They are not unrelated to the positions of the Human Rights Committee.

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[8] YADH BEN ACHOUR, *The European Court of Human Rights and Religious Freedom*, Pedone, Cours et travaux n° 3, 2005.

CHAPTER I

THE FAULT LINES BETWEEN THE COVENANT AND THE LEGAL SYSTEMS OF SOME MUSLIM STATES

SUMMARY: A. Constitutional and legal systems and their compatibility with the Covenant. – 1. The constitutional question and the nature of the state: The "State of religion"; Islamic republics; The systems of the 'state religion'; Secular systems. – 2. Problems relating to the compatibility of the rule of domestic law with the Covenant; Freedom of religion, criminalisation of apostasy and blasphemy; Criminal law and personal status; Gender inequality, sexual minorities. – B. Reservations and objections, revealing the tensions between domestic law and the provisions of the Covenant. – 1. Reservations. – 2. Objections. – 3. Positions of the Committee.

These fault lines between the letter and spirit of the Covenant and the legal systems of some Muslim States are clearly apparent through the essential features of the constitutional and legal systems, but also through the reservations to the Covenant made by these States and the objections to them.

A. *Constitutional and legal systems and their compatibility with the Covenant*

The most significant of the fault lines is the constitutional issue, namely the relationship between state and religion. We will start with this question. But other features of the legal system, in civil, family or criminal matters, also constitute problems in the relationship between some Muslim states and the Covenant.

1. *The constitutional question and the nature of the state*

This issue was carefully considered by the Special Rapporteur on freedom of religion or belief, Ahmed Shaheed, in his report to the Hu-

man Rights Council in February 2018,[1] according to which, Islam is the most widespread official religion in the world.[2] The Special Rapporteur noted in paragraph 14 of his report that, given the complexities of the issue, "there is no consensus as to either how the relationships between State and religion should be classified, or on the terminology for characterizing their nature". This general remark applies within the Muslim world itself. Indeed, the constitutional systems of Muslim countries, despite the current strong propensity towards Islamisation, are far from homogeneous.[3] Beyond the thinking of Muslim authors on human rights and the constitutional formulas that enshrine Sharia law as the main or one of the main sources of legislation, themes that have been inexhaustibly treated by researchers as erudite as Baudouin Dupret,[4] Constance Arminjon,[5] Dominique Avon,[6] we can globally classify the constitutional systems of Muslim States into "States of religion",[7] Islamic republics, systems of the State religion, and finally secular systems.

– *The "State of religion"*

Some systems, such as those of Saudi Arabia, which is not a party to the Covenant, or of Iran, constitute an almost full implementation of religious law, a kind of "state of religion". In Saudi Arabia, the Royal Decree of 1 March 1992 defines the Kingdom of Saudi Arabia as a sovereign Islamic Arab State, stating: "Its religion is Islam. Its constitution is the Book of Almighty God, the Holy Koran and the Sunna of the Prophet (PSL)". Saudi Arabia disregards, in the technical sense of the term, the concept of "law" or that of legislator. Despite attempts at re-

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[1] Human Rights Council, Thirty-seventh session, 26 February-23 March 2018, Agenda item 3, Report of the Special Rapporteur on freedom of religion and belief, A/HRC/37/49.

[2] "Among the 41 countries in which there is a state religion, 25 (61%) have Sunni Islam, Shia Islam or Islam in general as their official religion.

[3] Mustapha Afroukh (dir.), *L'islam en droit international des droits de l'homme [Islam in International Law of Human Rights]*, Institut Universitaire Varenne, 2019, p. 11.

[4] Baudouin Dupret, *Sharia law. Des sources à la pratique, un concept pluriel [Sharia Law. From the Sources to the Practice, a Multi-faceted Concept]*, Paris, La Découverte, coll "Cahiers libres", 2014.

[5] Constance Arminjon Hachem, *Les droits de l'Homme dans l'islam shi'ite.* Confluences et lignes de partage [*Human Rights in Shi'ite Islam. Confluences and Dividing Lines*], Les Éditions du Cerf, coll. "Islam, nouvelles approches", 2017.

[6] Dominique Avon, *La liberté de conscience: Histoire d'une notion et d'un droit [Freedom of Thought: History of a concept and a Right]*, Presses universitaires de Rennes, 2020.

[7] The concept of 'religious state' used by Special Rapporteur Ahmed Shaheed does not seem to me to take sufficient account of the significant difference between the systems of the integral religious state and the state religion (see § 59 et seq. of the above-mentioned report).

form initiated by King Abdullah in 2007, Saudi Arabia remains the only country in the world that applies uncodified law. Judges directly and fully apply the rules of law accepted by the Hanbalite school, in all matters of contract law, evidence, commercial law, criminal law and of course family law. These judges can request *fetwas* legal opinions, issued by scholars in religious sciences, especially in the science of *fiqh*.[8] In addition, Saudi Arabia has a *Mutawaa morality* police force responsible for monitoring public morality, particularly in matters of morality and commerce. This police depends on a body called the *Authority for the prescription of the lawfulness and warning against the blameworthy act,* (*al amr bil maarouf wa nahy' 'an al munkar*). It originates from a traditional Islamic public law institution, the *hisba.* In April 2016, with the liberalisation of society initiated by Prince Mohamed Ben Salman and in the face of internal and international criticism and the repetitive excesses of this morality police, the latter was reformed by a decree of the Council of Ministers and lost a large part of its direct execution powers.[9] In the event of an offence, it must refer it to the state police. This type of police exists in various forms in other states such as Iran, Afghanistan and Sudan before the revolution of 2019.

Iran is another example of a constitution based on the full implementation of a religious right. This can be seen first of all in the preamble and is further clarified by Articles 2 and 4 of the 1979 Constitution.[10]

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[8] Fiqh = Science of the rules of law derived from the *Text.*

[9] Among the causes of this reform, we can point out the criticisms directed against this religious police following the burning down of a girls' school in Mecca in 2002. According to one version of the facts, denied by the official authorities, the religious police allegedly blocked the school exits to prevent young girls from being seen in clothing that did not comply with Abaya dress standards. This incident resulted in the deaths of about 15 girls.

[10] Article 2 contains theological and political principles and precepts: "The Islamic Republic is a system based on belief in: 1. the One God (as stated in the phrase "There is no god except Allah"), His exclusive sovereignty and the right to legislate, and the necessity of submission to His commands; 2. Divine revelation and its fundamental role in setting forth the laws; 3. the return to God in the Hereafter, and the constructive role of this belief in the course of man's ascent towards God; 4. the justice of God in creation and legislation; 5. continuous leadership (imamah) and perpetual guidance, and its fundamental role in ensuring the uninterrupted process of the revolution of Islam; 6. the exalted dignity and value of man, and his freedom coupled with responsibility before God; in which equity, justice, political, economic, social, and cultural independence, and national solidarity are secured by recourse to: a. continuous ijtihad of the fuqaha' possessing necessary qualifications, exercised on the basis of the Qur'an and the Sunnah of the Ma'sumun, upon all of whom be peace; b. sciences and arts and the most advanced results of human experience, together with the effort to advance them further; c. negation of all forms of oppression, both the infliction of and the submission to it, and of dominance, both its imposition and its acceptance". Article 4 draws the

Unlike that of Saudi Arabia, the Iranian regime, which has had a certain constitutional tradition since the revolution of 1906, admits the existence of an autonomous legislative power, representing the sovereign people. Moreover, the Iranian Civil Code, which is a civil code of modern technology and substance, both modern and Shiite, drawn up in 1933, remains applicable under the government of the Islamic Republic. However, it should be stressed that this legislative power is subject to the approval of a Supervisory Board made up of six reputed doctors of religious sciences chosen by the Guide or the Board of Directors and six legal professionals elected by the Chamber of Deputies upon presentation by the head of the judiciary. This council is responsible for verifying the conformity of laws with Islam. After the Islamic revolution of 1979, new laws in line with the ideology of the Islamic revolutionary regime were passed, including the new penal law of 1981, which was subsequently reformed several times. The new penal law repealed the old Western-inspired texts and replaced them with provisions on penalties based entirely on Muslim law[11] with its classification in *Hodoud*,[12] *Ghessass*,[13] *Diat*,[14] *Tazirat*.[15] As for civil law, it is a mixture of modern law and duodecimal Shia law, particularly in the field of personal status and inheritance. The concluding observations adopted by the Committee on the periodic reports of Iran express the overall contradiction between Iranian law and the provisions of the Covenant, as we will detail later.[16]

– *Islamic republics*

Those republics proclaiming themselves "Islamic" according to their constitutions, such as Mauritania, Pakistan, Afghanistan, adopt, as their name suggests, republican rule characterised by mechanisms such

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legal consequences of this constitutional political theology by stating: "All civil, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations, and the fuqaha' of the Guardian Council are judges in this matter". *The Islamic Republic of Iran*, ALHODA International Publication & Distribution 2010.

[11] Reza Nourbaha, 'Iranian Criminal Law in the Light of the Guiding Principles of the Constitution of the Islamic Republic of Iran', Criminal Policy Archives 2001/1 (No. 23), p. 157. Islamic penal laws were amended in 1991, 1996 and 2013.

[12] Penalties fixed by the *Text.*

[13] Law of retaliation.

[14] Blood price. Compensatory compensation for involuntary injury to body or life.

[15] Penalties left to the discretion of the judge.

[16] Third periodic report of the Islamic Republic of Iran CCPR/C/IRN/CO/3.

as elections, the establishment of republican institutions, such as the House of Representatives, the executive and the judiciary, but which adopt particular principles that have little to do with what is meant by republic in Western constitutional law. They are not inspired by the classical Muslim constitutional system of the Caliphate as practiced under the Umayyads, Abbasids or Ottomans. However, they implement the rules of the Islamic legal system in fundamental matters, such as criminal law, family law, inheritance law and sometimes land and contract law. In truth, the qualification of "Islamic republic" by the constitution is quite formal. Some states, without declaring themselves constitutionally an "Islamic republic", fall under this category. The Egypt of President Morsi was moving in this direction, before the coup d'état of July 2013. Sudan, since the extension of Muslim law to the penal code by two dictators, in 1983 by Jaafar al Noumeiry, then in 1991 by Omar al Bachir, who did not proclaim himself constitutionally and officially Islamic, constituted, before the revolution of 2018-2019, an Islamic republic, on the same level as Mauritania, Pakistan or Afghanistan. We will consider two examples: Mauritania and Pakistan.

"Mauritania is an Islamic, indivisible, democratic, and social Republic". This is how Article 1 of the 1991 Constitution defines the regime of the State. On the relationship between the State and religion, Article 5 states: "Islam is the religion of the people and of the State". Mauritanian civil and criminal legislation is based on these constitutional provisions. Thus, Article 7 of the Mauritanian Penal Code provides for the following penalties: death, amputation and flogging, which are *hudûd* punishments provided for in the Koranic text. In the case of manslaughter, Article 296 of the same criminal code provides for the sentence of *Diya* (blood money), which is a financial compensation payable by the perpetrator to the victim's family.[17] In a section of the Penal Code, entitled "Attacks on the morals of Islam. Heresy, apostasy, atheism, refusal to pray, adultery", the Mauritanian legislator has provided for an Article 306 according to which:

> Any person who has committed a public insult to decency and Islamic morals or has violated sacred places or helped to violate them, […] shall be punished by a correctional sentence of three months to two years' imprisonment and a fine of UM[18] 5,000 to UM 60,000. Any Muslim guilty of

[17] The diyya mechanism is applied de jure or de facto in several Arab (Saudi Arabia, Libya, Sudan), African (Chad), or Asian (Pakistan) States.

[18] Uqiyya. Mauritanian monetary unit.

> the crime of apostasy, either by word or by action in an apparent or evident manner, shall be invited to repent within three days. If he does not repent within this period, he shall be sentenced to death as an apostate, and his property shall be confiscated for the benefit of the Treasury. If he repents before the execution of the sentence, the public prosecutor shall refer the matter to the Supreme Court, with a view to his full rehabilitation, without prejudice to a correctional sentence as provided for in paragraph 1 of this Article. Any person guilty of the crime of heresy (*Zendaqa*) shall, unless he repents beforehand, be punished by the death penalty. […] Any Muslim of full age who refuses to pray while acknowledging the obligation to pray shall be invited to perform it up to the limit of the time prescribed for the performance of the compulsory prayer concerned. If he persists in his refusal until the end of this time limit, he will be punished by the death penalty. If he does not acknowledge the obligation to pray, he shall be punished by the penalty of apostasy and his property shall be confiscated for the benefit of the public treasury. He shall not benefit from the funeral rite of Muslims.[19]

Article 307 provides that:

> Any Muslim adult of either sex, guilty of the crime of *Zina* committed voluntarily and established either by (4) four witnesses, or by the confession of the perpetrator, or, in the case of the woman, by a state of pregnancy, shall be punished publicly, if he is unmarried, with a flogging of one hundred (100) lashes and one year imprisonment. If the offender is male, the prison sentence shall be carried out outside the place where the crime was committed. If the perpetrator is ill, the execution of the sentence shall be suspended until recovery. However, the penalty of death by stoning, *rajm*, shall be pronounced on a married or divorced offender. In the case of a woman in a state of pregnancy, the sentence of flogging and stoning shall be suspended until delivery.

Article 308 states: "Any Muslim adult who commits an indecent or unnatural act with a person of his or her sex shall be punished by public stoning to death. In the case of two women, they shall be punished with the penalty provided for in Article 306 (1)".[20] These are just a few exam-

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[19] Official Gazette of the Islamic Republic of Mauritania No. 608-609 Date of promulgation: 9 July 1983 Date of publication: 29 February 1984 Order No. 83.162 pp. 112- 149 63/93.

[20] Art. 309. – Anyone who commits the crime of rape shall be punished with hard labour in due time without prejudice, where appropriate, to the penalties of *Had and* flogging if the perpetrator is unmarried. If he is married, only the death penalty shall be pronounced.

ples that reveal the degree of influence of the classic Malekite *fiqh* on Mauritanian positive law. These criminal rules, although sometimes neglected in practice, as well as other civil rules, for that matter, will be the subject of the Committee's concerns and recommendations in its concluding observations on Mauritania.

In the case of Pakistan, Article 2 of the Constitution of Pakistan provides that Islam is the religion of the State, adding, however, that the resolution passed on 12 March 1949 by the Constituent Assembly, entitled "*The objectives resolution*" and reproduced as an annex to the Constitution, constitutes an integral part of the Constitution and shall have full constitutional force.[21] This founding document of the Republic of Pakistan encompasses a number of principles of a religious nature concerning divine sovereignty over the whole universe, admitting that this sovereignty is delegated to the State, through the people, that the principles of democracy, freedom, equality, tolerance and social justice "as formulated by Islam" will be fully implemented, that Muslims will organize their individual and collective life "in accordance with the teachings and requirements of Islam as set forth in the Holy Qur'an and the Sunnah". Drawing the consequences of these principles, Pakistan has developed civil legislation regarding evidence, family law, and criminal legislation strictly in line with Sunni Muslim law.

– *The systems of the 'state religion'*

Most Muslim states, such as Algeria, Bangladesh,[22] Jordan, Egypt, declare Islam as the state religion. It must be admitted that this notion of "state religion", by its generality and ambiguity, is susceptible to various interpretations. Its impact on the legal system varies considerably from one country to another. Some state religion countries practise a fairly ex-

[21] "Whereas sovereignty over the entire universe belongs to Allah Almighty alone and the authority which He has delegated to the State of Pakistan, through its people for being exercised within the limits prescribed by Him is a sacred trust …This Constituent Assembly representing the people of Pakistan resolves to frame a Constitution for the sovereign independent State of Pakistan; Wherein the State shall exercise its powers and authority through the chosen representatives of the people; Wherein the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed; Wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and the Sunnah".

[22] C. 1972. Art. 2. A. "The state religion of the Republic is Islam, but other religions may be practiced in peace and harmony in the Republic".

tensive Islamisation of the law, while others, on the contrary, apply a relatively secularised law. However, according to the Human Rights Committee, this notion of 'state religion' should not be understood as establishing a monopoly for the benefit of a religion. According to § 9 of General Comment (GC) 22,

> The fact that a religion is recognised as a State religion or that it is established as an official or traditional religion, or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor any discrimination against adherents to other religions or non-believers. In particular, certain measures discriminating against the latter, such as measures restricting eligibility for government service to members of the predominant religion or giving economic privileges to them or imposing special restrictions on the practice of other faiths, are not in accordance with the prohibition of discrimination based on religion or belief and the guarantee of equal protection under article 26.

– *Secular systems*

Some Muslim countries, for historical reasons of their own, declare themselves "secular" in their constitutions.

Turkey experienced a secular revolution in 1923 under the leadership of Kemal Atatürk. States that had belonged to the Soviet Union, such as Azerbaijan, Turkmenistan, Kazakhstan and Kyrgyzstan, proclaimed themselves secular.[23] Other states, such as Syria, Burkina Faso, Mali, Senegal or Chad also proclaim themselves secular in their constitutions. But in all these countries, secularism has neither the same substance nor the same scope. Some of them manage religion in general and Islam in particular with vigilance, if not mistrust. This is the case of the

[23] Kazakhstan's last constitution was adopted by referendum on 30 August 1995. Article 1 of this constitution states: "The Republic of Kazakhstan proclaims itself a democratic, secular, legal and social state whose highest values are an individual, his life, rights, and freedoms".

Article 7 of the Constitution of Azerbaijan adopted by referendum on 12 November 1995 states that: "The Azerbaijani State is a democratic, law-governed, secular, unitary republic".

The Constitution of Turkmenistan adopted by the referendum of 18 May 1992 states in its Article 1 that "Turkmenistan is a democratic, legal and secular state in which the government takes the form of presidential republic".

The constitution of Kyrgyzstan adopted by the referendum of 27 June 2010 states in its first article: "The Kyrgyz Republic (Kyrgyzstan) is a sovereign, democratic, secular, unitary and social state governed by the rule of law".

states belonging to the former Soviet Union. Before the Committee, complaints are directed against the State in the name of the freedom of religious minorities, whether Islamic or otherwise. Others, such as present-day Turkey, despite their proclaimed secularism, regard Islam as a privileged religion.

As we have indicated, Turkey has adopted secularism since the Kemalist revolution. The Constitution of 1924, which still proclaimed Islam as the state religion, was first revised by Law No. 1222 of 10 April 1928, which removed from the Constitution the articles declaring Islam as the state religion. In 1937, a further revision of the Constitution by Law No. 3115 of 5 February 1937 introduced into Article 2 of the Constitution the principle of secularism, which will no longer disappear from Turkish constitutions. According to Article 2 of the 1982 Turkish Constitution: "The Republic of Turkey is a democratic, secular and social state governed by rule of law, within the notions of public peace, national solidarity and justice respecting human rights, loyal to the nationalism of Atatürk and based on the fundamental tenets set forth in the preamble". The meaning of secularism in Turkey is not so much to separate religion from the State, but to bring all religious institutions, places of worship, and imams under the supervision and control of the State. To achieve this objective, Kemal Atatürk had law 429 of 3 March 1924 passed which created a state administration called *Diyanet İşleri Başkanlği*, whose essential function is to manage the affairs of Sunni Islam in Turkey and certain foreign states. Atatürk not only enshrined the principle of secularism in the 1924 constitution, through the revision of 1937, but he also pursued a secular policy which manifested itself in the de-Islamisation of the state and society. Today, with the coming to power of the AKP and Recep Tayib Erdogan, we are witnessing both an authoritarian drift of the regime and an Islamisation of society, which, without officially calling into question the principle of secularism, is void of part of its meaning.

This classification should be considered with great care. It is quite relative. In reality, in order to judge the "Islamity" of a state, it is not enough to consider the constitutional provisions. It is necessary to look at the legal system itself and even morals.

2. *Problems relating to the compatibility of the rule of domestic law with the Covenant*

These problems obviously stem from the constitution and the nature of the state we have just mentioned. As soon as a state proclaims Is-

lam as the religion of the state, adding that Sharia is the source or one of the main sources of legislation, or stating that no law may derogate from the principles of Sharia, it gives Sharia a constitutional value and pre-eminence over the law. In any event, and insofar as international conventions have a lower value than the constitution in these States, this has the effect of relativizing the value of international conventions, particularly those relating to human rights, in the hierarchy of legal norms. At the outset, therefore, we have a serious problem of compatibility between the national legal system of a good number of Muslim states and the Covenant. This was noted directly by the Human Rights Committee in its concluding observations on the third periodic report of the Islamic Republic of Iran of 2 November 2011. In paragraph 5 of its observations, the Committee states:

> The Committee notes with concern that reference is made in the State party's system to certain religious tenets as primary norms. The State party should ensure that all the obligations of the Covenant are fully respected and that the provisions of its internal norms are not invoked as justification for its failure to fulfil its obligations under the Covenant.

A number of Muslim States, in accordance with their constitutional principles, are adopting civil, family or criminal legislation inspired by Shariah law, but which is incompatible with the provisions of the Covenant. We will begin with legislation concerning freedom of religion and the criminalisation of apostasy and blasphemy.

– *Freedom of religion, criminalisation of apostasy and blasphemy*

In most Islamic states, freedom of religion does not enjoy social credit and is not fully guaranteed legally. In addition, the Islamic religion has a special status that gives it a virtual monopoly of the religious landscape.

In Saudi Arabia, which has more than a million Filipino Christians, "No non-Muslim places of worship exist, and non-Muslim religious practice in private is prohibited and punished.[24] In Iran, Article 13 of the Constitution declares that: "Zoroastrian, Jewish, and Christian Iranians are considered the only recognized religious minorities. They may exercise their religious ceremonies within the limits of the law. They are free

[24] Abdelfattah Amor, "Constitution and Religion in Muslim States", Nawaat, *https://nawaat.org/2005/02/07/constitution-et-religion-dans-les-etats-musulmans-4*.

to exercise matters of personal status and religious education and they follow their own rituals". Thus, as Professor Amor notes:

> Outside these minorities, there is no religious freedom. This leads to the exclusion from the benefit of freedom, in particular the Baha'i community, which seems to be subject to a regime of control and sometimes repression by the Iranian authorities. In Indonesia religious freedom is limited to Islam, Hinduism, Buddhism, Catholicism and Protestantism. In Pakistan the Ahmadiyya, according to the Constitution, are not Muslims and are punished if they claim Islam. Some states, such as Egypt, Morocco and Mali, impede the worship and propagation of the Baha'i religion.[25]

Other issues relating to freedom of religion reveal the incompatibility between the rule of domestic law and the Covenant. This is the case with the predominance in fact or in law of the confessional legal system which, despite undeniable historical successes, is likely to lead to discrimination between Muslims and non-Muslims.

Among the expressions of this privilege of Islam is the question of apostasy and blasphemy.

The criminalisation of apostasy and blasphemy is a major stumbling block between the legal systems of some Muslim countries and the human rights system. There is no basis for such criminalisation in the Koranic text. Official doctrines have found a basis for it in the Sunna of the Prophet.[26] This has been enshrined in the learned historical tradition and in the centuries-old practice of Islamic countries. Nowadays, we find an eloquent expression of it in the unified penal code of the Arab states. According to this draft, unanimously adopted by the Ministers of Justice in 1996, blasphemy is punishable by the death penalty. All these laws punishing blasphemy or apostasy are contrary to both Article 18 of the 1948 Declaration of Human Rights and Article 18 of the Covenant. What aggravates the situation, as Special Rapporteur Ahmed Shaheed notes in paragraph 83 of his above-mentioned report, is that these laws are used to repress "political dissidents, humanists, non-believers or any religious thinker who expresses different theological views than the State-sponsored religion. As also called for in several recent international action plans, such anti-blasphemy laws must be repealed as a matter of priority and are incompatible with the Covenant".

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[25] Abdelfattah Amor, *ibid.*

[26] In reference to a Hadith of the Prophet, reported by Boukhâri: "Whoever changes his religion, kill him".

– *Criminal law and personal status*

The Islamic penal system, which stems partly from an interpretation of the *Text* of Islam, but which was later largely extended by the penal policies and practices of the Islamic empires, sultanates and emirates, constitutes a crucial point of friction. This system, widely disseminated by all schools of *fiqh*, admits capital punishment and corporal punishment, which can reach a very high degree of cruelty, including, for some famous legists such as Ibn Tamiyya (d. 1328) and his disciple, Ibn Qayyim al Jawziyya (d. 1350), confessions obtained under torture for crimes committed by notorious offenders.[27] Part of this penal system completely ignores the modern principle of the legality of offences and penalties, as it relies on the discretionary power of the judge or prince – *ta'zîr* – for certain crimes or offences. The authors discuss whether by *ta'zîr*, the death penalty could be applied.

As will be discussed below, the personal status applicable in Muslim states raises many issues of compatibility with the civil and political rights internationally enshrined in the 1966 Covenant, particularly with regard to the principle of equality between men and women.

– *Gender inequality, sexual minorities*

Several Islamic legislations enshrine in a more or less prominent way the inequality between men and women, particularly in the areas of civil procedure, family law and inheritance, which is sometimes aggravated in social practices. It is unnecessary to insist on the issue of sexual tendencies and gender identity, which consist of recent "discoveries" totally unknown on the one hand, and severely sanctioned on the other hand, by the old penal systems, the Islamic penal system being no exception to the rule. The classical Islamic legal system unanimously accepts the death penalty for homosexuals. Today, the death penalty is rarely applied, but homosexuality is still generally punished as a criminal offence. Finally, it should be pointed out that there are certain customary practices, such as forced marriage, honour killings, early marriage, excision, absolute marriage of the rape victim with the perpetrator of the crime, which have no direct relationship with Islamic law, but which are quite widespread in the area of Islamic civilisation.

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[27] See Ibn Qayyim al Jawziyya, *Al Turuq al hukmiyya fî al siyâsaal Shar'iyya*, (dealing with public criminal law), comments and notes by Nâyif Ben Ahmad al Hamad, ed. Dâr Âlam al Fawâ'id, vol. 1, p. 275.

B. *Reservations and objections, revealing the tensions between domestic law and the provisions of the Covenant*

1. *Reservations*

The Covenant was adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966. It entered into force on 23 March 1976. If we look at the formal criterion of a State's membership in the Organization for Islamic Cooperation, we see that of the 173 member states, the overwhelming majority of the 57 Muslim States have ratified it.[28] However, some states belonging to this group, such as Bahrain, Kuwait, Pakistan, Mauritania, and Qatar have entered reservations which clearly reveal the main fault lines between their legal systems and the rights and freedoms protected by the Covenant. However, at the time of ratification, on 4 August 1967, Egypt made an unpublished and unexpected declaration according to which: "…taking into consideration the provisions of the Islamic Sharia and the fact that they do not conflict with the text annexed to the instrument, we accept, support and ratify it…"[29] For Egypt, therefore, there is neither contradiction nor incompatibility between the Pact and the Islamic Shariah. It is an interpretation that raises great difficulties, given the obvious points of incompatibility that we will raise later on.

Bahrain makes the following statement with regard to Articles 3, 18 and 23 of the Covenant: "1. The Government of the Kingdom of Bahrain interprets the Provisions of Article 3, (18) and (23) as not affecting in any way the prescriptions of the Islamic Shariah". Mauritania makes a declaration concerning Articles 18 and 23: "The Mauritanian Government, while accepting the provisions set out in article 18 concerning freedom of thought, conscience and religion, declares that their application shall be without prejudice to Islamic Shariah". With regard to Article 23 (4):

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[28] Have not ratified Saudi Arabia, the United Arab Emirates and Oman. The OIC States: Afghanistan, Algeria, Albania, Azerbaijan, Bahrain, Bangladesh, Benin, Bosnia-Herzegovina, Burkina Faso, Cameroon, Comoros, Côte d'Ivoire, Djibouti, Egypt, State of Palestine, Gambia, Guinea, Guinea-Bissau, Indonesia, Iran, Iraq, Jordan, Kazakhstan, Kenya, Kyrgyzstan, Saudi Arabia, Kuwait, Lebanon, Libya, Malawi, Maldives, Mali, Mauritania, Central African Republic, Chad, Morocco, Niger, Nigeria, Oman, Pakistan, Qatar, Senegal, Somalia, Sri Lanka, Sudan, Suriname, Syrian Arab Republic, Tajikistan, Tunisia, Turkey, Turkmenistan, United Republic of Tanzania, Uzbekistan, Yemen, Zambia, Zimbabwe.

[29] The reservations and declarations have been taken from the United Nations Treaty Collection website, *https://treaties.un.org/Pages/Home.aspx?clang=_fr* and the Human Rights Library of the University of Minnesota, *http://hrlibrary.umn.edu/hrcommittee/French/reservations_hrc.html*.

"The Mauritanian Government interprets the provisions of Article 23 (4), on the rights and responsibilities of spouses as to marriage as not affecting in any way the prescriptions of the Islamic Shariah". Qatar's reservations essentially concern Article 3[30] of the Covenant with regard to the provisions on succession to power, which are contrary to the provisions of Article 8 of the Constitution,[31] and Article 23 (4), which is considered contrary to the Shariah. Initially, at the time of ratification of the treaty on 23 June 2010, Pakistan had entered reservations which were quite revealing of this tendency to follow to the letter the provisions of classical Islamic law, as understood by Sunnis. These reservations concerned fundamental Articles of the Covenant, Articles 3, 6, 7, 12, 13, 18, 19 and 25.[32] These reservations elicited a large number of objections from States Parties, which prompted Pakistan to withdraw most of them. Indeed, in a communication dated 20 September 2011, the Government of Pakistan notified the Secretary-General of its decision to partially withdraw the reservations to Articles 3 and 25 made upon ratification. In a communication of the same date, the Government of Pakistan notified the Secretary-General of its decision to partially withdraw the reserva-

[30] "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant".

[31] "The state government is hereditary in the Al Thani family and in the lineage of the male descendants of Hamad Bin Khalifa Bin Hamad Bin Abdullah Bin Jassim. The government is inherited by the son designated as heir presumptive by the Amir. In the event that there is no son, the prerogatives of the government would pass to a member of the family designated as heir presumptive. In this case, his male descendants would inherit the government. The provisions relating to the government of the State and the advent of the Emir are regulated by a special law to be published within one year from the date of entry into force of the Constitution. The law has the nature of a constitutional law".

[32] In June 2010, Pakistan made the following reservations: "The Islamic Republic of Pakistan declares that the provisions of Articles 3, 6, 7, 18 and 19 shall be so applied to the extent that they are not repugnant to the Provisions of the Constitution of Pakistan and the Sharia laws". "The Government of the Islamic Republic of Pakistan declares that the provisions of Article 3 of the International Covenant on Civil and Political Rights shall be so applied as to be in conformity with Personal Law of the citizens and *Qannon-e-Shahadat*". "The Islamic Republic of Pakistan declares that the provisions of Article 12 shall be so applied as to be in conformity with the Provisions of the Constitution of Pakistan". "With respect to Article 13, the Government of the Islamic Republic of Pakistan reserves its right to apply its law relating to foreigners". "The Government of the Islamic Republic of Pakistan states that the application of Article 25 of the International Covenant on Civil and Political Rights shall be subject to the principle laid down in Article 41 (2) and Article 91 (3) of the Constitution of Pakistan". "The Government of the Islamic Republic of Pakistan hereby declares that it does not recognize the competence of the Committee provided for in Article 40 of the Covenant".

tions to Articles 6, 7, 12, 13, 18, 19 and 40 of the Convention made upon ratification.

All of these reservations are indicative of the cultural, religious and political unease felt by the authorities of the Islamic States with regard to the provisions of the Pact. These provisions were objectively contrary both to the dominant legal culture in Muslim countries, including their representation of the relationship between the sacred and the law, and to the authoritarian nature of the State in most Muslim countries. However, given the clear contradiction between the provisions of the Covenant and these reservations, the latter will raise a number of objections, particularly from Western states.

2. *Objections*

The objections of certain States (Canada, Finland, Estonia, Belgium, Spain, United States, Germany, France, Greece, Hungary, Latvia, United Kingdom, Poland, Portugal, Slovakia, Sweden, Netherlands, Switzerland) to these reservations highlight the main divergences between the provisions of the Covenant and the rules of so-called "Muslim" law.

Some states, such as Germany and Austria, consider that these objections cast doubt on the State's willingness to implement the Covenant and are contrary to the object and purpose of the Covenant (see annexes).

Other states, such as the United States, Austria, France, Latvia, the United Kingdom or Belgium, invoke the general, vague and indeterminate nature of these reservations, which do not allow the signatory states to assess the degree of the state's commitment to the treaty (see annexes).

Australia relies on the argument that a state cannot rely on its domestic law to avoid its treaty obligations (see annexes). Poland clarifies that: "[…] the domestic law should, as a rule be brought into line with the provisions of a treaty by which a given state is bound" (see annexes). The non-derogable nature of certain articles of the Covenant, such as Article 18, has also been invoked (objection by Australia). Switzerland considers that certain articles have the value of *Jus Cogens (*see annexes). The United Kingdom considers that these reservations tend to unilaterally limit the scope of the Covenant (see annexes).

3. *Positions of the Committee*

The Human Rights Committee considers that the reservations made by some states to certain articles of the Covenant are not compatible with

the Covenant. Thus, in §§ 6 and 7 of its concluding observations of 19 July 2019 on the second periodic report of Mauritania, the Committee states that:

> 6. The Committee remains concerned that the reference in the preamble to the Constitution to Islam as the only source of law could lead to legislative provisions that are not compatible with the provisions of the Covenant. The Committee notes with regret the State party's position that it will maintain its reservations to articles 18 and 23 (4) of the Covenant, under which these articles are applicable only to the extent that they do not affect the prescriptions of sharia law. The Committee is of the view that these reservations are incompatible with the object and purpose of the Covenant (arts. 2, 18 and 23).
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> 7. The Committee reminds the State party that it should ensure that the reference to Islam does not prevent the full application of the Covenant in its legal order and is not interpreted or applied in such a way as to impede the enjoyment of the rights set forth in the Covenant. The Committee encourages the State party to withdraw its reservations to articles 18 and 23 (4) of the Covenant.

Same position of the Committee in the concluding observations on the periodic report of Bahrain (19 July 2018).

> 7. The Committee regrets that the State party has maintained its reservations to articles 3, 9 (5), 14 (7), 18 and 23 of the Covenant and not indicated whether it plans to withdraw them. In particular, it notes with concern the overly broad reservations to articles 3, 18 and 23, under which these articles are applicable only to the extent that they do not affect the prescriptions of sharia. The Committee is concerned that some of the reservations may be incompatible with the object and purpose of the Covenant (art. 2).
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> 8. The State party should consider reformulating or withdrawing its reservations to articles 3, 9 (5), 14 (7), 18 and 23 with a view to ensuring the full and effective application of the Covenant.

Thus, the Committee's positions on the issue of reservations are unambiguous. It shares the objections that have been formulated by some states, confirming a substantial incompatibility between the constitutional and legal systems applying Sharia law and the principles and rules of the Covenant.

We will now examine the attitude of the Committee when confronted with the Islamic question, either through the periodic reports

submitted by Muslim states, in accordance with Article 40 of the Covenant, or through the Committee's views, in contentious matters, i.e., in cases where an individual complaint is submitted to the Committee, in accordance with the Optional Protocol to the Covenant.

The answer to this question can be articulated in two main points: firstly, the Committee ensures the protection of Islam as a religion and as a community, on the same basis as all other religions, under Article 18 and other articles of the Covenant. Secondly, the Committee punishes violations of the Covenant arising either from hostile conduct towards freedom of religion and religious minorities or from Islamic legislation contrary to the Covenant. These two points will be the subject of the following two parts.

CHAPTER II

THE HUMAN RIGHTS COMMITTEE AND THE PROTECTION OF ISLAM AS A RELIGION AND FAITH COMMUNITY

SUMMARY: A. Protection under Article 18 of the Covenant: Variety of abuses; Acceptable restrictions and restrictions contrary to the Covenant. – B. Protection under Articles 18 and 26; The Committee's positions through the concluding observations; The Committee's positions in contentious cases; The Baby-Loup case; The cases Sonia Yaker (com. 2747/2016) and Miriana Hebbadj (2807/2016). – C. Direct and indirect protection of freedom of religion and religious communities. – D. Indirect protection under Articles 6 and 7 of the Covenant.

In domestic law, in democratic countries Islam enjoys the legal protections afforded to all religious communities. In France, for example, as Hervé Bleuchot notes,

> Muslims, like the followers of any religion, benefit from the protection given by French law to freedom of conscience… They are in particular protected against defamation and public insult, provocation to discrimination, hatred or violence because of their membership of that religion.[1]

In international human rights law, Article 18 of the Covenant on Civil and Political Rights is obviously the most important reference for the Committee to ensure the freedom of all religions, including Islam.

A. *Protection under Article 18 of the Covenant*[2]

A few general remarks should be made about Article 18. First of all, the differences or nuances between freedom of thought, conscience, and

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[1] HERVET BLEUCHOT, "Loi française et loi islamique [French Law and Islamic Law]", *https://www.academia.edu/12134657/Loi_fran%C3%A7aise_et_loi_islamique?email_work_card=view-paper.* p. 6.

[2] Article 18, consisting of four paragraphs, states: "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to

religion should be established. Freedom of thought refers to all fields of thought that can be open to the reflection and creativity of the human mind. Freedom of thought covers the political field as well as the artistic, literary, philosophical, scientific or technological fields. In all these fields, reflection must develop without hindrance and give free rein to creativity and invention. Freedom of conscience, on the other hand, is more restricted in its scope. It is specifically concerned with the general affairs of the world and of the city in which everyone can be involved, as a pure individual, as a citizen or as a member of a community of beliefs or ideas.[3] It can be implemented in the political, philosophical and religious fields which imply the freedom to determine oneself – in all conscience – and to decide, without being threatened or coerced. And it is precisely in its "impact zone" with the religious field that freedom of conscience becomes a politically, ideologically and culturally sensitive and controversial freedom.[4] In this zone of impact, it opens the doors to every conceivable passion, fury and fanaticism. It is then that it becomes the essential cause of exclusion, repression and death, which are used by groups fanatical about ignorance, as well as by authoritarian or dictatorial states, in order to satisfy their instincts of aggression or their desire to monopolise the social and political field. As for freedom of religion, the main object of Article 18, it concerns a very specific field, that of beliefs and convictions relating to the afterworld (or the world beyond) and to the worship that the followers of these beliefs and convictions practise in order to implement them. However, it should be made clear that the term "belief" in Article 18 does not necessarily refer to religious convictions, which may

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adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions".

[3] Dominique Avon, *La liberté de conscience: Histoire d'une notion et d'un droit [Freedom of Thought: History of a concept and a Right]*, Presses universitaires de Rennes, 2020.

[4] On this topic, see the encyclopaedic comment by Manfred Nowak on the Covenant. *U.N. international covenant on civil and political Rights*, 3rd revised Edition, by William A. Schabas, Germany, N.P. Engel Publisher, 2019, p. 499.

have the effect of broadening the scope of Article 18 to include the freedom to choose any religion or belief other than religion.

Article 18 of the Covenant should be compared with Article 18 of the 1948 Universal Declaration of Human Rights.[5] The latter declares:

"Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance". The Covenant, mainly to obtain the adherence of Muslim countries and under their influence,[6] does not include the possibility to change religion. However, the Committee's interpretation, particularly in General Comment 22, has been in favour of the possibility of changing religion. The Committee even considers that changing religion is part of the very foundations of freedom of conscience. It is in this sense that the debate has taken shape in Tunisia. Indeed, during the drafting of the 2014 Constitution, and despite the resistance of the majority Islamist party in the National Constituent Assembly, freedom of conscience became synonymous with the freedom to change religion and it is with this connotation that it was introduced in Article 6 of the Constitution.

Article 18 goes on to specify that freedom of religion is a multifaceted or multidimensional freedom. It includes the freedom to choose, but also the freedom to give concrete expression to those choices in the form of worship[7] or other practices, such as teaching.[8] Some authors make a distinction between 'passive' freedom, which consists of the freedom to freely choose a religion, and 'active' freedom, which consists of expressing, manifesting, through external and visible behaviour, the

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[5] On Article 18 of the Universal Declaration of Human Rights, see the excellent article by DOMINIQUE AVON, *La liberté de conscience* droit [*Freedom of Thought: History of a concept and a Right*], op. cit., pp. 27 et seq.

[6] Manfred Nowak and W.A. SCHABAS, *op. cit.*, p. 501.

[7] According to GC No. 22, "The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group".

[8] GC 22 § 5: "In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications".

choices of the 'inner self'.[9] However, this distinction must be put into perspective, because any decision to choose a religion, even in its deepest internal forum, requires a sometimes very complex activity of thought, in a dialogue not only with oneself but with others, which cannot be described as "passive". Freedom of thought, conscience and religion therefore constitutes, globally and in itself, a freedom that is always active.

Finally, Article 18 not only protects freedom of religion, but also imposes limits on it. First of all, it places classical limits on all the rights and freedoms protected by the Covenant, such as freedom of assembly or freedom of opinion, including restrictions designed to protect public safety, order and health, or morals and the rights and freedoms of others. And since we know that religion can be intimately linked to politics and the State, it must therefore respect the provisions of Article 18 (2): "No one shall be subject to coercion that would impair his freedom to have or adopt a religion or belief of his choice".[10] Religion therefore has no right of coercion. It does not have the right to have a monopoly whatever its motives or origin.[11] For this reason, the Committee states in its General Comment 22: "The Committee notes that public education that includes instruction in a particular religion or belief is inconsistent with Article 18.4 unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians". In § 10 of the same General Comment, the Committee states:

> If a set of beliefs is treated as an official ideology in constitutions, statutes, proclamations of ruling parties, etc., or in actual practice, this should not

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[9] Manfred Nowak and W.A. Schabas, *op. cit.*, pp. 504 and 509.

[10] "The Committee observes that the freedom to "have or to adopt" a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief The Committee observes that the freedom "to have or to adopt" a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief".

[11] OG 22, § 5. "Article 18.2 bars coercion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert. Policies or practices having the same intention or effect, such as, for example, those restricting access to education, medical care, employment or the rights guaranteed by article 25 and other provisions of the Covenant, are similarly inconsistent with Article 18.2. The same protection is enjoyed by holders of all beliefs of a non-religious nature".

result in any impairment of the freedoms under article 18 or any other rights recognized under the Covenant nor in any discrimination against persons who do not accept the official ideology or who oppose it.

The Committee has given a broad interpretation to freedom of religion by highlighting the latter aspect of the issue, i.e., the balance between freedom of religion and the prohibition of any coercion or monopoly. In paragraph 2 of its General Comment 22, the Committee states: "Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms "belief" and "religion" are to be broadly construed".

It is on the basis of these basic principles enshrined in international human rights law on freedom of religion, belief and conviction[12] that the Committee will proceed to protect Islam as a religion and religious community on the same basis as all other religions.

– *Variety of abuses*

Violations of freedom of religion can take many forms. It may arise from moral considerations, as well as from material or physical considerations. It is for this reason that freedom of religion may be combined both with articles that protect life or physical integrity, such as Articles 6 and 7 of the Covenant, and with articles that protect freedom of belief or manifestation of religion, either positively through worship, teaching or proselytizing or negatively through defamation, harassment, hate speech, interference in private life or in the functioning of justice, prohibition of religious practices, degradation or destruction of places of worship, prohibition of the import or export or distribution of religious books, punishment of conscientious objection. The infringement may result from mechanisms or behaviour of exclusion, stigmatisation, exploitation, criminalisation or discrimination, thus implementing Articles 2, 3, 6, 7, 14, 17, 19, 20, 21, 22, 23, 24, 25, 26 and 27 of the Covenant.

This variety of abuses is reflected, for example, in the concluding observations on the third and fourth reports of Egypt adopted on 31 October 2002,[13] in which the Committee expressed concern about violations of freedom of religion or belief, including the prohibition of worship by the Baha'i community and pressure on the judiciary by extrem-

[12] Heiner Bielefeldt, Nazila Ghaneaet, Michael Wiener, *Freedom of Religion or Belief: An International Law Commentary* Oxford University Press, 2016.

[13] CCPR/CO/76/EGY.

ists claiming to be Muslim, which even manage, in some cases, to impose their own interpretation of religion on the courts, the lack of intervention by the State party following the dissemination in the Egyptian press of certain very violent articles directed against Jews, which are genuine appeals to racial or religious hatred and constitute incitement to discrimination, hostility or violence. Through these concluding observations, we see the multifaceted nature of the violations that can affect freedom of religion, not only through Article 18, but also through other articles of the Covenant such as Articles 14, 19, 20. In its concluding observations on the initial report of Pakistan, the Committee expressed its concern about "the removal of Ahmadis from the general electoral list and their registration on a separate voting list". This amounts to both exclusion, contrary to Article 25 and discrimination, contrary to Articles 2, 26, 27 of the Covenant.[14]

The variety of abuses is also apparent from paragraphs 38 and 39 of the concluding observations on the second periodic report of Turkmenistan adopted on 23 March 2017, in which the Committee highlights "undue restrictions" on freedom of religious belief, such as the mandatory registration of organisations, restrictions on religious education and the import and distribution of religious literature, refusal to register minority religious communities, raids and confiscation of religious literature and intimidation, arrest and imprisonment of members of religious communities, especially Protestants and Jehovah's Witnesses, demolition of mosques and churches.

In an individual complaint (Communication No. 2146/2012, Views of 21 March 2017), the author, a Muslim, complained that security guards were drinking alcohol and eating pork and had invited him to join them. They made insulting remarks about him and his religion. Such an attitude, which symbolically undermines religious values, could give rise to a violation of Article 18.[15] In the present case the claim was declared inadmissible, but the Committee concluded that the facts disclose a violation of Article 7 of the Covenant, read alone and in conjunction with Article 2 (3), and that the author's detention in inhuman, degrading and inhuman conditions violated Article 10 (1) of the Covenant. Rather

[14] In its responses to the list of issues and questions concerning its initial report, Pakistan states: "After the Second Amendment of the Constitution of 1973 (Art. 260 (3), 1974) minority status was granted to the Ahmadiyya community. Under Article 20 of the Constitution, the Ahmadis enjoy all the rights of Pakistani citizens, including the right to profess their religion without discrimination".

[15] *Zhaslan Suleimenov v. Kazakhstan*, CCPR/C/119/D/2146/2012.

rare cases of abuse may arise. This is the case of the mechanism of self-identification of religious communities practised in Cyprus, which can lead to discrimination.[16]

– *Acceptable restrictions and restrictions contrary to the Covenant*

In the Views on communication 2457/2014, Mukhlisov v. Kazakhstan (130th session October 2020),[17] the Committee recalled its jurisprudence on Article 18. The case concerned a common law prisoner who complained that the prison administration had obstructed his religious practice, removed his religious literature and required him to shave his beard. The Committee makes very nuanced findings by making distinctions between different expressions of religion and balancing the requirements of order and freedom to manifest one's religion. In the first place, the Committee reaffirms the general principle concerning freedom to manifest one's religion, applicable to all religions. It states in paragraph 9.3 of its Views which is a virtually standard paragraph directly inspired by Article 18 of the Covenant and General Comment 22: "The Committee reaffirms that the freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts and that the concept of worship extends to ritual and ceremonial acts giving expression to belief, as well as various practices integral to such acts".[18] It recalls, however, that freedom to manifest one's religion or belief is not absolute and may be subject to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.[19] The require-

[16] In its C.Os on the Fourth Report of Cyprus of 31 March 2015: "The Committee reiterates its concern that the State party does not make any concrete provision to revise Article 2 of the 1960 Constitution, which recognizes only those religious groups with membership of over 1,000 on the date that the Constitution came into force and therefore excludes certain religious groups from the principle of self-identification, and is an impediment to their full enjoyment of the freedom of religion, as was noted by the Special Rapporteur on freedom of religion or belief in his 2012 report on his mission to Cyprus (*A/HRC/22/51/Add.1*). The Committee is also concerned that the 2011 census did not effectively implement the principle of self-identification (art. 27). The State party should adopt the legal measures necessary to ensure that all religious communities enjoy equal recognition".

[17] CCPR/C/129/DR/2457/2014.

[18] See *Boodoo v. Trinidad and Tobago* (CCPR/C/74/D/721/1996), para. 6.6, in which the Committee recognizes the right of a prisoner to wear a beard on the basis of his religious beliefs. See also general comment No. 22 (4).

[19] See *Malakhovsky et al. v. Belarus* (CCPR/C/84/D/1207/2003), para. 7.2; *Prince v. South Africa* (CCPR/C/91/D/1474/2006), para. 7.2.

ment of necessity implies that the restriction must be proportionate, in gravity and intensity, to the objective which inspires it and cannot become the rule.[20] The Committee also recalls that it is for the state party to show that the restrictions imposed on the author's rights under Article 18 of the Covenant were necessary and proportionate. It then proceeds to apply this principle to the particular circumstances of the case and classifies the restrictions as either permissible under Article 18 or contrary to Article 18. The former are acceptable because they are necessary. Thus:

> […] uniform and collective conduct of all inmates at a fixed time, such as during building works and searches, are necessary and even if religious practice is hindered during the period of such scheduled activities, those restrictions cannot be seen as disproportionate to the purpose of maintaining order in the correctional facility.

Accordingly, this hindrance to religious practice does not violate Article 18(1). On the other hand, forcing the author to shave his beard does not constitute a necessary restriction in so far as the wearing of a beard would not interfere with the functioning or discipline of the detention centre. As the State could not justify such a restriction, it is therefore contrary to the freedom to manifest one's religion and constitutes a violation of Article 18 (1). We can see from this case that it all depends on the circumstances surrounding the restriction. There is therefore neither a general principle nor an absolute rule. Only the circumstances are determinative, and it is therefore necessary to proceed on a case-by-case basis, taking into account only the empirical criteria of necessity and proportionality.

B. *Protection under Articles 18 and 26*

The protection of Islamic religious communities, in the context of states in which Islam is not the majority religion, is exercised on the basis of the two principles of freedom of religion and non-discrimination. This is the case in European countries. The situation of Muslim communities in European countries is extremely complex. On the one hand,

[20] In paragraph 8 of general comment 22, the Committee observes that "paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security".

there are fears about Muslim communities because of the phenomena of violence or terrorism that are attributed to certain radical groups among Muslim communities. On the other hand, however, these communities are victims of discriminatory stereotypes, hate speech, and exclusionary behaviour. The Committee does not hesitate to denounce such negative attitudes towards Muslim communities.

– *The Committee's positions through the concluding observations*

For example, as a simple example, in its concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland adopted on 18 July 2008, the Committee states in paragraph 16:

> The Committee remains concerned that negative public attitudes towards Muslim members of society continue to develop in the State party. (arts. 18 and 26) The State party should take energetic measures in order to combat and eliminate this phenomenon, and ensure that the authors of acts of discrimination on the basis of religion are adequately deterred and sanctioned. The State party should ensure that the fight against terrorism does not lead to raising suspicion against all Muslims.[21]

In its concluding observations on the fifth periodic report of France on 10 July 2015, the Committee states in § 23:

> The Committee is concerned about the resurgence of racist and xenophobic discourse in both the public and political spheres, and fears that this may lead to the rise of intolerance and a feeling of rejection in some communities. The Committee is also concerned about the upsurge in violent incidents of a racist, anti-Semitic or anti-Muslim nature (arts. 2, 18, 20 and 26). The State party should recall regularly and publicly that any advocacy of hatred that constitutes incitement to discrimination, hostility or violence is prohibited by law and should act promptly to bring perpetrators to justice. The State party should step up its efforts against racist, anti-Semitic and anti-Muslim violence, in particular by conducting investigations and by punishing the perpetrators of such acts.[22]

In its concluding observations on the seventh periodic report of the Russian Federation adopted on 31 March 2015, the Committee expresses its concern about Islamophobia, anti-Semitism, racism and xenopho-

[21] CCPR/C/GBR/CO/6.
[22] CCPR/C/ENG/CO/4.

bia.[23] In its concluding observations on the fourth periodic report of Cyprus (31 March 2015), the Committee expresses concern about reports that:

> […] the freedom of religion and belief of certain minorities, particularly Muslims, owing to limited access to places of prayer, including the Hala Sultan Tekke Mosque, which is only open for worship on Fridays and about reports of inadequate maintenance of Muslim cemeteries. The Committee is also concerned that the travel restrictions at the crossing points […] above prevent some Turkish Cypriots from undertaking religious pilgrimages in the southern part of the island (arts. 12 and 18). The State party should ensure that its legislation and practices conform fully with the requirements of article 18 of the Covenant.

The problem of protecting the freedom of the Islamic religion is particularly crucial in relation to certain forms of dress, such as the wearing of the veil or the niqab.

The appearance of clothing can indeed express a religious conviction. As such, it must be protected, and any restrictions must be justified in fact and in law and strictly comply with the requirements of Article 18. In its concluding observations on the fourth periodic report of France of 22 July 2008, the Committee:

> […] is concerned that both elementary and high school students are barred by Act No. 2004/228 of 15 March 2004 from attending the public schools if they are wearing so-called "conspicuous" religious symbols. […] The Committee notes that respect for a public culture of *laïcité* would not seem to require forbidding wearing such common religious symbols. […] The State party should re-examine Act No. 2004/228 of 15 March 2004.

This recommendation calls on the State to comply with both freedom of religion and the principle of equality guaranteed in Article 26.[24] The idea is taken up in a different way in France's fifth report (21 July 2015). The Committee gave its opinion on the law regulating the wearing of conspicuous signs in public schools (Law No. 2004-228) and on the law prohibiting the concealment of the face in the public space (Law No. 2010-1192). In § 22 of its concluding observations, the Committee states:

> The Committee is of the view that these laws infringe the freedom to express one's religion or belief and that they have a disproportionate impact

[23] CCPR/C/RUS/CO/7.
[24] CCPR/C/ENG/CO/4.

> on members of specific religions and on girls. The Committee is further concerned that the effect of these laws on certain groups' feeling of exclusion and marginalization could run counter to the intended goals (arts. 18 and 26). The State party should review Act No. 2004-228 of 15 March 2004 and Act No. 2010-1192 of 11 October 2010 in the light of its obligations under the Covenant, in particular article 18 on freedom of conscience and religion and the principle of equality set out in article 26.[25]

Similarly, in paragraphs 17 and 18 of its concluding observations on the sixth report of Belgium (1 November 2019),[26] the Committee states:

> 17. Noting the low number of women wearing burkas or niqabs in the State party, the Committee is concerned about the law governing the wearing of full veils in public, which calls for fines or prison sentences and could be a disproportionate infringement on the freedom to manifest one's religion or belief. In addition, the Committee is concerned about the prohibition against the wearing of religious symbols at work, in certain public bodies and by teachers and students at public schools, which could result in discrimination and the marginalization of certain persons belonging to religious minorities (arts. 2, 3, 18 and 26). 18. The State party should reconsider its legislation on the wearing of religious symbols and clothing in public, at work and in schools, in accordance with its obligations under the Covenant, in particular in respect of the right to freedom of thought, conscience and religion and the right to equality before the law.

– *The Committee's positions in contentious cases*

In contentious cases, the committee will remain on the same line and adopt the same positions. It has had to examine two important cases and has aligned itself with its general observations concerning France. These are the Baby-Loup and Sonia Yaker and Hebbadj cases.

– *The Baby-Loup case*

The first case was the subject of the findings in Communication No. 2662/2015, F.A. v. France of 16 July 2018.[27] In this case, a teacher in a secular private crèche was dismissed in 2008 because of the wearing of the veil. Before the Committee, she raises the violation of both Articles 18 and 26 of the Covenant. We will follow the Committee's reasoning

[25] CCPR/C/ENG/CO/5.
[26] CCPR/C/BEL/CO/6.
[27] CCPR/C/123/D/2747/2016.

through the essential paragraphs of its Views. In § 8.3 the Committee recalls that according to GC 22, the freedom to manifest one's religion includes the wearing of distinctive clothing or head coverings and that this is "a customary practice for many Muslim women, who consider it an integral part of the manifestation of their religious belief". The prohibition therefore constitutes interference. Second, it must be determined whether the restriction complies with Article 18 (3) (strictly understood), including whether it is provided for by law, is necessary for the protection of public safety, order, health or morals or the fundamental rights and freedoms of others. The Committee specifies that:

"Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner". The Committee notes that the restriction was prescribed by law (8.5). Is it "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others"? In this respect, the Committee recalls (8.6) that restrictions "must be directly related and proportionate to the specific need on which they are predicated". The arguments of the parties are as follows. France argues that the restriction had a legitimate aim, namely the protection of the rights and freedoms of children and their parents, that the Islamic headscarf is not "a passive sign" but a "strong outward sign", and that the crèche must be kept away from "ostentatious manifestations of religious affiliation". As for the author, she asserts that only an act of pressure or proselytism could infringe the fundamental rights and freedoms of others. It does not prohibit the family from freely guiding their children in the exercise of their freedom of conscience and religion. The author adds that the total and permanent neutrality of the crèche's employees was not necessary.

Refuting the State's arguments, the Committee notes that the State does not explain to what extent the wearing of the headscarf would be incompatible with social stability and childcare within the crèche, nor that it would be incompatible with the aim of the association running the crèche, especially since one of the objectives of the association is to enable the economic, social and cultural integration of women, including the author, without distinction of political or confessional opinion. With regard to proportionality, the Committee takes note of the state party's arguments that states must enjoy a certain margin of appreciation "in determining whether and to what extent interference is necessary". How-

ever, it also notes that, according to the author, who had been wearing a headscarf since 1994, even at work, the restriction was not proportionate because of its overly stigmatizing nature. It recalls that the wearing of a headscarf in itself cannot be considered as constituting an act of proselytism and that the restriction is contrary to Article 18 of the Covenant.

It remained to assess the restriction under Article 26 and whether it was aimed at a particular religion or philosophical belief or resulted in different treatment between employees. After recalling General Comment 18 (1989),[28] the Committee emphasizes that the prohibition of discrimination applies to both the public and private spheres and that a violation of Article 26 may result from a rule or measure that appears to be neutral or devoid of any discriminatory intent, but which in fact has a discriminatory effect.[29]

In § 8.12, after recalling its General Comments on the periodic report of France, the Committee states that the restriction in the rules of procedure "disproportionately affects Muslim women, such as the author, making the choice to wear a headscarf, which constitutes differential treatment". Does this treatment have a legitimate purpose and is it reasonable and objective? The Committee, in § 8.13, answers this question in the negative. It notes that the author was dismissed without severance pay, without any explanation as to why the headscarf would prevent her from performing her duties and without assessing the proportionality of that measure. Accordingly, the Committee considers that the State party "has not sufficiently substantiated how the author's dismissal from her job due to the wearing of the headscarf had a legitimate purpose or was proportionate to that purpose". The Committee therefore concludes that the dismissal of the author based on the internal rules of the crèche and the Labour Code "was not based on a reasonable and objective criterion and thus constitutes intersectional discrimination based on gender and religion, in violation of Article 26 of the Covenant.

The Committee also considers that the assessment of the religious character of a symbol, such as a headdress, veil or wig, is a subjective and objective matter which depends both on the person's inner feelings and on the way in which he or she is viewed. Thus, in the case of Seyma

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[28] According to which discrimination is defined as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life", of all human rights and fundamental freedoms.

[29] *Althammer et al. v. Austria* (CCPR/C/78/D/998/2001), para. 10.2.

Türkan, Communication No. 2274/2013 adopted on 18 July 2018, the Committee notes that:

> […] although the author was wearing a wig and not a headscarf, she states that she did so to cover her hair in accordance with her religious beliefs. The Committee further notes the author's contention that the University inferred from her wearing a wig that it was done with a religious purpose, and that she was denied permission to register for religious reasons.[30]

– *The cases Sonia Yaker (com. 2747/2016) and Miriana Hebbadj (2807/2016)*

The cases of Sonia Yaker (com. 2747/2016)[31] and Miriana Hebbadj (2807/2016)[32] considered and adjudicated on 17 July 2018 illustrate the Committee's extreme tolerance of religious freedom and its severity regarding restrictions on that freedom. Both French Muslim women authors, out of religious conviction, wear the niqab which completely conceals the face. They were prosecuted and fined 150 Euros for breaching Law No. 2010-1192 of 11 October 2010 on the prohibition of wearing clothing designed to conceal the face in the public space. For the authors, the prohibition and criminalisation of concealment of the face in the public space undermines their rights under Articles 18 and 26 of the Covenant. After having been rejected as inadmissible by the European Court of Human Rights, they applied to the Committee on 22 February 2016. The Committee decided that, in the circumstances of the case, the State party had violated Articles 18 and 26 of the Covenant. Let us follow the Committee's reasoning.

The Committee assumes freedom to manifest one's religion in religious rites, ceremonial acts and customs. It states in relation to the veil in § 8.3 that: "the wearing of the full veil is customary for a segment of the Muslim faithful and that it concerns the performance of a rite and practice of a religion".

It notes that the ban on wearing the full veil constitutes a restriction. It then proceeds to assess the restriction in the light of Article 18 (3) (prescribed by law, necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others). The Committee recalls that this paragraph is to be interpreted strictly and that re-

[30] CCPR/C/123/D/2274/2013/Rev.1.
[31] CCPR/C/123/D/2747/2016.
[32] CCPR/C/123/D/2807/2016.

strictions "may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated", without being discriminatory.

It must therefore be assessed whether this restriction, which is provided for by law, pursues a legitimate aim, is necessary to achieve that aim and is proportionate. In § 8.7, the Committee takes note of the State's argument that every individual must be able to be identified in order to prevent attacks on the security of persons and property or to combat identity fraud. The Committee recognises this in certain contexts, but subjects it to limits. The first is that, barring justified exceptions, this restriction cannot be general and absolute.

The Committee observes that the law is not limited to such specific contexts but "comprehensively prohibits the wearing of certain face coverings in public at all times, and that the State party has failed to demonstrate how wearing the full-face veil in itself represents a threat to public safety or order that would justify such an absolute ban". Furthermore, the State party has not explained why it is prohibited to cover one's face for certain religious reasons, but "is justified for health reasons or on professional grounds, or is part of sporting, artistic or traditional festivities or events". Accordingly, the State party has not highlighted any specific context "or provided any example, in which there was a specific and significant threat" that would justify a general prohibition.

Similarly, the Committee considers in § 8.8 that the State party has not shown that the prohibition is proportionate to the purpose to be protected, given the impact of the prohibition on the author "as a [Muslim] woman wearing the full-face veil", nor that the prohibition was the least restrictive measure to protect freedom of religion or belief. In other words, the balance that must be maintained between the requirements of order and the protection of the freedoms protected by the Covenant was not respected. In paragraph 8.9, the Committee will examine the second objective presented by the State to justify the restriction, that of protecting the rights of others.

The State's argument is as follows: the normal course of social life requires respect for 'living together' in the public space. Indeed, it is in the public space that members of society are brought into contact with each other. What is at stake here is the minimum of trust that everyone must have in their relationship with each other, through the identification of each other's faces. Hiding one's face is therefore an unfair way of living in society. While recognizing the State's right to promote sociabil-

ity and respect, and while acknowledging that concealment of the face could be perceived as an obstacle to social interaction, the Committee nevertheless refuses to raise these considerations to the level of acceptable restrictions within the meaning of Article 18 (3) of the Covenant. As already indicated, § 3 is to be interpreted strictly.

In § 8. 10 of its Views, the Committee considers that the protection of the rights of others requires the identification of the concrete fundamental rights that are affected and the persons concerned. In other words, in this type of situation, it is necessary to proceed on a case-by-case basis, in a concrete and not an abstract manner.[33] For the Committee, the concept of "living together" is very vague and abstract, and cannot in itself justify a general restriction. The State party has not specified what freedoms or rights of others might be affected by the fact that some people wear the full veil, nor why these rights would be affected by wearing the full veil and not by concealing the face by many other means not covered by the law. The Committee concludes that: "The right to interact with any individual in public and the right not to be disturbed by other people wearing the full-face veil are not protected by the Covenant and therefore cannot provide the basis for permissible restrictions within the meaning of article 18 (3)".

The Committee clarifies in paragraph 8.11 that:

> Even assuming that the concept of living together could be considered a "legitimate objective" […], the Committee observes that the State party has failed to demonstrate that the criminal ban on certain means of covering of the face in public, which constitutes a significant restriction of the rights and freedoms of the author as a Muslim woman who wears the full-face veil, is proportionate to that aim, or that it is the least restrictive means that is protective of religion or belief.

This is the famous proportionality test.

In the end, the Committee considers that the restriction was neither necessary nor proportionate and thus violated the rights protected by Article 18. We now come to the other basis of the communication, the violation of Article 26.

According to the author of the communication, the law prohibiting the concealment of the face in the public space constitutes indirect discrimination against Muslim women who wear the headscarf. On the contrary, for the State party, the prohibition has no religious connota-

[33] General comment No. No. 22, para. 8.

tion. Indeed, it does not specifically target the niqab worn by some Muslim women, but exclusively "the extremely radical form of clothing, which results in the public effacement of the person". However, an examination of the circumstances in which the law was passed, as well as the debate that took place in the National Assembly, reveals that the restriction was in fact aimed only at the full Islamic veil and the Muslim women who wear it. In the logic of the Committee, the law therefore affects "a form of religious observance and identification for a minority of Muslim women". The Committee will then review the law to determine whether it meets the reasonableness and legitimacy of the objective assigned to it.

The Committee recalls the principle that: "A violation of article 26 may result from the discriminatory effect of a rule or measure that is apparently neutral or lacking any intention to discriminate".[34] It clarifies, however, that a difference in treatment does not systematically constitute discrimination, provided that it is based on reasonable and objective criteria[35] and pursues a legitimate aim.[36] For the Committee, the question is therefore whether such differential treatment satisfies the criteria of reasonableness, objectivity and legitimacy of the aim pursued.

In paragraph 8.15, the Committee observes that the State party has not explained how the general ban on the full veil is reasonable or justified "in contrast to the exceptions allowable under the Act".[37] This prohibition, according to the Committee, "appears to be based on the assumption that the full veil is inherently discriminatory and that women who wear it are forced to do so". While acknowledging that some women may be forced by family or social pressure to cover their faces, the Committee believes that "that the wearing of the full veil may also be a choice – or even a means of staking a claim – based on religious belief, as in the author's case".[38] It adds that the prohibition may be counterproductive in that it may result in women being confined to their homes,

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[34] See *Althammer et al. v. Austria* (CCPR/C/78/D/998/2001), para. 10.2.

[35] See, for example, *Brooks v. the Netherlands* (CCPR/C/29/D/172/1984), para. 13; and *Zwaan-de Vries v. the Netherlands* (CCPR/C/29/D/182/1984), para. 13.

[36] See *O'Neill and Quinn v. Ireland* (CCPR/C/87/D/1314/2004), para. 8.3.

[37] See in this regard *C v. Australia* (CCPR/C/119/D/2216/2012), para. 8.6.

[38] In the same vein, the European Court of Human Rights held in the case of *S. A. S. v. France* (para. 119), that "a State Party cannot invoke gender equality in order to ban a practice that is defended by women – such as the applicant – in the context of the exercise of the rights enshrined in those provisions, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms".

marginalized and denied access to public services.[39] The Committee stresses that, contrary to the State's claim, sanctions imposed on women wearing full face veils necessarily have negative effects on the author's right to manifest her religion.

The Committee concludes in § 8.17 that the criminal prohibition introduced by Article 1 of Law No. 2010-1192 "disproportionately affects the author as a Muslim woman who chooses to wear the full-face veil, and introduces a distinction between her and other persons who may legally cover their face in public that is not necessary and proportionate to a legitimate interest, and is therefore unreasonable". Thus, the law violates the principle of non-discrimination enshrined in Article 26 of the European Convention on Human Rights.

This is the line of reasoning followed by the Committee in these cases relating to the wearing of the full veil. These Views were not implemented by the French Government, as is apparent from the follow-up report on the Views adopted by the Committee during the Hundred and Twenty-Seventh Session.[40]

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[39] CCPR/C/FRA/CO/5, para. 22.

[40] Follow-up to Views under the Optional Protocol to the Covenant. CCPR. C/127/R.2.

Submission from the State party: " As a preliminary remark, the State party points out that these Views were examined in the presence of only 13 out of the 18 members of the Committee and were the subject of two dissenting individual opinions. In addition, it draws attention to the fact that several articles commenting on the Committee's decision appeared in the press before its official notification to the Government. The State party regrets this breach of confidentiality. It also draws the Committee's attention to the fact that such incidents are seriously prejudicial to the Government and may damage the reputation and credibility of the Committee's work.

With regard to the Committee's reasoning in its Views, the State party submits that Act No. 2010-1192 of 11 October 2010 prohibiting the concealment of the face in the public space has as its objectives the protection of security and public order and the preservation of the minimum requirements for living in society, and does not seek to prohibit a particular religious practice or manifestation.

The State party recalls that freedom of religion may be restricted and that the primary objective of the Act is to prevent practices tending to conceal one's face, which may constitute a danger to public security and which disregard the minimum requirements of living in society, and more specifically of "living together". The State party recalls that the terrorist threat environment in France, following the recent wave of attacks, requires the identification of individuals in public places, and it draws the Committee's attention to two recent serious crimes committed by individuals who were wearing burkas.

The State party submits that the European Court of Human Rights held in *S.A.S. v. France* that "having regard in particular to the breadth of the margin of appreciation afforded to the respondent State in the present case, the Court finds that the ban imposed by the Law of 11 October 2010 can be regarded as proportionate to the aim pursued, namely the preser-

It is now appropriate to consider the merits of these findings, starting with the opinion of those members who voted with the majority and gave reasons for their decision. I present this concurring opinion because it highlights the nuances of the reasoning followed by the Committee.

Some members of the Committee who voted with the majority[41] pointed out that the Respondent State "has not demonstrated how wearing the full-face veil in itself poses a threat to public safety or public order that would justify such an absolute ban". Similarly, according to the same members, the State party "has not persuasively explained how the interest of "living together" could justify compelling individuals belonging to a religious minority, under threat of criminal sanction, to dress in a manner conducive to "normal" social interaction". However, they recognise in their joint opinion that the wearing of the full veil could have a discriminatory effect. To this effect they write in paragraph 2 of this joint opinion:

> We are more receptive, however, to the implicit claim that the full veil is discriminatory […], as we consider the wearing of the full veil to be a traditional practice that has allowed men to subjugate women in the name of preserving their "modesty",[42] which results in women not being entitled to occupy public space on the same terms as men.

The State could therefore take all necessary measures to prevent this discriminatory effect. The question therefore revolves around whether the law and the criminal sanctions it provides for are too broad in scope, and whether such measures are appropriate in the circumstances of the case. The members in favour point out that:

> […] the State party has not demonstrated to the Committee that less intrusive measures than the blanket ban, such as education and awareness-raising against the negative implications of wearing the full-face veil, crim-

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vation of the conditions of 'living together' as an element of the 'protection of the rights and freedoms of others'".

In this regard, the State party expresses its concern at the Committee's Views, which diverge from this regional court judgment, the execution of which is mandatory for States parties, and draws the Committee's attention to the risks of fragmentation of the international order".

[41] Joint opinion of the Committee members Ilze Brand Kehris, Sarah Cleveland, Christof Heyns, Marcia V.J. Kran and Yuval Shany (concurring).

[42] See A/HRC/29/40, para. 19, in which the Working Group on the question of discrimination against women in law and practice reported that conservative religious extremist movements impose strict codes of modesty to enslave women and girls in the name of religion.

> inalizing all forms of pressure on women to wear such a veil and a limited ban enforced through appropriate non-criminal sanctions on wearing the full veil in specific social contexts, underscoring the State's opposition to the practice (such as prohibiting the full-face veil for teachers in public schools or government employees addressing the public), would not have resulted in sufficient modification of the practice of wearing the full veil, while respecting the rights to privacy, autonomy and religious freedom of the women themselves, including those who choose to wear the veil.

In other words, the State has not demonstrated that less drastic measures would not have been sufficient to curb the wearing of the full veil without disproportionately infringing on the freedom to manifest one's religion. The measure is therefore unreasonable and proportionate and becomes incompatible with the Covenant. "[…] our position on the high threshold for justifying a ban on clothing chosen by women is generally consistent with the relevant parts of the European Court of Human Rights in its judgment in *S.A.S. v. France*, in which the Court rejected a justification of the ban on the grounds of, among others, anti-discrimination".[43] This concurring opinion clarifies the substance of the Committee's Views in the two cases of concern.

First of all, it confirms that the violation of Articles 18 and 26 arises not from the prohibition itself, but from its general and absolute nature. Furthermore, the members of the Committee who are the authors of this opinion recognise, however, that the wearing of the headscarf is discriminatory in nature, since it stems from a "traditional practice that has allowed men to subjugate women in the name of preserving their "modesty", which results in women not being entitled to occupy public space on the same terms as men". They logically deduce from this to regard:

> France as entitled – and, in fact, under an obligation, pursuant to articles 2 (1), 3 and 26 of the Covenant, as well as article 5 (a) of the Convention on the Elimination of All Forms of Discrimination against Women – to take all appropriate measures to address this pattern of conduct so as to ensure that it does not result in discrimination against women.

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[43] *S. A. S. v. France* (Application No. 43835/11), judgment of 1 July 2014, paras. 118-120. In this case France advanced the republican values of equality between men and women, personal dignity and respect for the requirements of social life. The Court, like the Committee, set aside the values of equality and dignity, insofar as the niqab corresponds to a free choice and does not infringe the dignity of others. However, the Court considers that "respect for the minimum requirements of life in society", i.e., living together, may bring into play Articles 8 and 9 concerning the "protection of the rights and freedoms of others". For this reason, the Court found that there was no violation of Articles 8 and 9 of the ECHR.

Thus, the nuances introduced by this concurring opinion somewhat relativize the scope of the findings in the Yaker and the Hebbadj case.

The dissenting opinions highlighted flaws in the reasoning of the Committee's findings. In his dissenting opinion, Mr. José Santos Pais first emphasized the political rather than the legal nature of the dispute, pointing out that the authors of the communication had made no reference to the religious requirements that would have obliged them to wear the niqab and that the State's restriction would have violated them. "We are therefore facing a religious custom, not an undisputed religious obligation" (see below). The dissenting opinion also points out that the impugned law was adopted in a general democratic political climate, after broad consultation, which is one of the conditions for the acceptability of the restriction. The principle of proportionality was respected. Indeed, "The general ban introduced by the Act is limited in scope, given that only the concealment of the face is prohibited. Sanctions are measured, lawmakers having prioritized the role of education (para. 5.3)". Moreover, the criminal penalties provided for are not particularly severe. They are simple fines. Similarly, the principle of predictability has been taken into account. "The Act pursues a legitimate aim, the protection of the rights and freedoms of others and the protection of public order, as clearly defined in the Act's statement of purpose". In the context of the development of international terrorism, marked by attacks that are as numerous as they are deadly, "it is of extreme importance to quickly identify and locate possible suspects, since they travel through different countries to arrive at their destination and may avail themselves of the niqab to go unnoticed". I agree with Mr Santos Pais' conclusions on the legitimacy of the objective pursued, and the motivation drawn from public order and security, as well as the customary and not strictly religious nature of wearing the full veil in an Islamic climate.

I will insist more on the fact that the wearing of the niqab constitutes, in itself, a violation of the secular and democratic republican order of France. The niqab is, in itself:

> […] a symbol of the stigmatization and degrading of women and as such contrary to the republican order and gender equality in the State party, but also to articles 3 and 26 of the Covenant. Defenders of the niqab reduce women to their primary biological status as females, as sexual objects, flesh without mind or reason, potentially to blame for cosmic and moral disorder, and in consequence obliged to remove themselves from the male gaze and thus be virtually banished from the public space. A democratic State cannot allow such stigmatization, which sets them apart from all other

> women. Wearing the niqab violates the "fundamental rights and freedoms of others", or, more precisely, the rights of other women and of women as such. Its prohibition is therefore not contrary to the Covenant.

For Mr Santos Pais, whom I fully agree with, "The authors never explain which religious prescriptions impose the use of the niqab on them or which part of the Qur'an they base their conclusions on. […] We are therefore facing a religious custom, not an undisputed religious obligation". If it is a custom, in the name of what would be the privilege of being raised to the level of a religious conviction. The Committee continues:

> The Committee has in the past refused to accept as violations of the provisions of the Covenant certain social or religious customs and practices that run counter to human rights (female genital mutilation, honour and ritual killings, attacks against persons with albinism and many others). Therefore, the fact that the authors invoke a violation of their religious beliefs does not necessarily lead to the conclusion that their rights have been violated.

It would therefore have been necessary, according to the same member, that the Committee consider: "This extreme and radical form of religious belief […] with caution so as to allow the Committee to reach a fair and reasonable decision, which unfortunately, in the present case, did not occur". In this case, the authors refuse to respect "social predominant values", and on this point it must be left to each State to democratically define "the legislative framework of their societies, while respecting their international obligations". The State party has done so scrupulously. The author's offending law was adopted unanimously less one vote by the National Assembly, after a broad democratic debate. Civil society was consulted, including Muslim associations. The state considered the wearing of the full veil to be contrary to the fundamental values of the republic. Furthermore, the restriction was limited in scope, with measured sanctions. It covers any garment intended to conceal the face without distinction between men and women, and without the intention of discriminating against any religious community.

Accordingly, Mr Santos Pais considers that "no special treatment is reserved for garments worn for religious or cultural reasons and only the most radical form of clothing that makes the person invisible in public is affected". This law has been explained and disseminated to the public. It also provided for a period of six months for its entry into force and

therefore met the requirement of foreseeability. It pursues a legitimate aim, which is the defence of the values of the republic and the requirements of living together. This requirement was recognised by the European Court of Human Rights in the case of *S. A. S. v. France.* It is also justified by the imperatives of public security and public order, in particular to prevent identity fraud, in a context characterised by the development of international terrorism. In Mr Santos Pais' view, the Committee does not appear to have given sufficient weight to the latter requirement. The author of the dissenting opinion recalls that: "France has experienced several terrorist attacks by Al-Qaida and Islamic State in Iraq and the Levant".[44] In such a context, it is of the utmost importance to quickly identify and locate potential suspects, who cross several borders to reach their destination and sometimes use the niqab to avoid detection.

> In the *Yaker* case, the author was sentenced twice, the second time because she refused to remove her full-face veil at the security checkpoint to enter the court. Is it reasonable to force a judge to accept a person that he or she is going to judge to have his or her face covered during the trial?

In these circumstances, and given the moderate nature of the sanctions, the restriction does not seem excessive. Mr. Santos Pais' conclusion is that there has been neither a violation of Article 18 nor a violation of Article 26 in these cases. I reproduce in the annex the dissenting opinion which I myself expressed in the Yaker and Hebbadj cases.

C. *Direct and indirect protection of freedom of religion and religious communities*

The difference between direct and indirect protection lies in the fact that in the first case, the rights and freedoms derived from freedom of religion are directly linked to an article of the Covenant and constitute the

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[44] Île-de-France, in January 2015 (20 dead, 22 injured), Paris, in November 2015 (137 dead, 368 injured) and Nice, in July 2016 (87 dead, 434 injured). In 2017, a total of 205 terrorist attacks, planned, aborted or perpetrated, were reported by nine EU Member States (France was hit by 54 attacks). In 2017, a total of 975 people were arrested in the EU for terrorism-related offences. Most of the arrests (705 out of 791) were against jihadists (123 women, 64 per cent of whom were EU nationals and EU-born). In France alone, there were 411 arrests and 114 convictions. In terms of the number of suspects arrested for reasons related to religious/Jihadist inspired terrorism (705), 373 of the arrests concerned France. Source: European Union Agency for Law Enforcement Cooperation, *European Union Terrorism Situation and Trend Report 2018* (The Hague, 2018).

direct objective of the protection. Indirect protection affects freedom of religion and the rights of religious communities, by *ricochet*. For example, a violation of Articles 6 or 7 of the Covenant may arise from the fact that the violation of freedom of religion, for example the death penalty for apostasy, may be the cause of the violation of Articles 6 or 7. In this case, freedom of religion is not directly targeted for protection, since the right to life is at stake here, but it is nevertheless the trigger for protection under Article 6. What is important is to emphasise already at this point that when the Committee takes a position on such issues, it is also indirectly judging laws imposing the death penalty or corporal punishment for violation of the sacred.

The protection of freedom of conscience and religion under Article 18 is obviously a direct protection. It is the principal and most important protection. We can classify under the same heading the protection of freedom of religion under Articles 20, 26 and 27. Indeed, Article 20 prohibits "advocacy of national, racial or religious hatred that constitutes incitement to discrimination", so it can be used directly to protect religious communities from hate speech, xenophobia or antisemitism. Article 26 relates to the principle of equality before the law. It states:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In the case of the application of Article 26, we can therefore consider that freedom of religion must be exercised equally before the law and without discrimination. It is therefore a matter of direct protection. The same applies to Article 27 on the protection of the rights of ethnic, religious or linguistic minorities. Article 27 provides in particular that:

> […] persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

It is clear that this article directly protects religious minorities wishing to exercise their freedom of religion in any form. We find this protection in another form, that which allows the Committee to sanction State legislation contrary to Articles 20, 26 and 27. But this same free-

dom can be protected indirectly through other articles of the Covenant, notably Articles 6 and 7.

D. *Indirect protection under Articles 6 and 7 of the Covenant*

As we will see later in details, these articles take effect, in particular with regard to the deportation or expulsion of Muslim asylum seekers to their country of origin. In this matter, the Committee follows established case law which refers to General Comment No. 31, according to which States are under an obligation not to extradite, remove or expel a person to another State, if there are substantial grounds for believing that there is a real and personal risk of irreparable harm to that person in the territory of that State.[45] At this stage, we will settle for a single illustrative example.

In its Views of 8 November 2017, on communication No. 2471/2017 submitted by *Mehrdad Mohammad Jamshidian* of Iranian nationality against Belarus, the Committee received an application claiming that by deporting him to the Islamic Republic of Iran, Belarus would violate his rights under Articles 6, 7, 9, 17, and 18 of the Covenant, read in conjunction with Articles 14 (1 and 2) of Article 23 of the Covenant.

Arriving in Belarus in 1993, married in 2011 to a Belarussian woman, the author resided in Belarus until 2005 without having duly registered, and was subject to administrative sanctions for this reason in 1999 and 2002. Between 2005 and 2009, he served a prison sentence in Belarus for fraud. On 21 September 2009, he was deported to the Islamic Republic of Iran. He was able to return to Belarus on 6 November 2011. On 9 December 2012, the Iranian authorities issued an international arrest warrant against the author for the murder of his mother and brother. After multiple incidents, on 16 August 2013, the author applied for asylum and the deportation procedure was suspended. In support of his asylum application, the author claims that he had converted to Christianity, which in the Islamic Republic of Iran was punishable by the death penalty,[46] as he was accused of murdering his mother and brother,

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[45] Example, *Jama warsame v. Canada*, Communication No. 1959/2010, 20 July 2011, CCPR/C/102/D/1959/2010.

[46] The author invokes Article 18 of the Covenant, alone and read in conjunction with Articles 6, 7 and 14, paragraphs 1 and 2. He states that he converted to Christianity in 2002. He attends religious services with his family and celebrates Christian holidays. At a hearing before the Minsk Central District Court on 1 July 2016, a priest named S.K. testified that in

he also faced the death penalty as a result, although he claimed to be innocent. On 30 May 2014, the Department of Citizenship and Migration rejected the author's application for asylum, on the grounds that the author had not provided sufficient evidence of his conversion to Christianity, that attending religious services and living in a Christian country was not sufficient to be granted protection, that there was no information of which the Iranian authorities were aware of his conversion and that the author had not reported any problems in this regard when he returned to the Islamic Republic of Iran in 2010 and 2012. On the basis of the available information, the Department concluded that there was no information relating to the torture of suspects in criminal cases in Iran. It therefore held that the prosecution of the author for murder under Iranian law could not be considered an act of torture. The author was informed of this decision on 10 June 2014 and was detained for deportation on the same day. He claims that by returning him to the Islamic Republic of Iran, the State party would violate his rights under Articles 6 and 7 of the Covenant. In a subsequent submission, the author also claims that his deportation to the Islamic Republic of Iran would constitute a violation of Article 18, read in conjunction with Articles 6 and 7 and Article 14 (1 and 2), of the Covenant. Having declared the other claims inadmissible, the Committee accepted that by deporting the author to the Islamic Republic of Iran, the State party would be in violation of Articles 6 and 7 of the Covenant.

In this type of case, it is indeed an indirect protection through Articles 6 and 7 of the Covenant, for the benefit of converts, considered as apostates and punishable by very serious criminal sanctions in some Islamic States. We will find this indirect protection in relation to the expulsion of persons on the grounds of their sexual orientation or gender identity, to Islamic States having an extremely repressive and severe penal arsenal against certain sexual behaviour which they consider to be immoral and anti-religious social perversions.

2002 he had admitted the author to the Christian religion and considered him to be a devout Christian. The author claims that the Iranian authorities are aware of his conversion, which is confirmed by statements and letters from the Embassy of the Islamic Republic of Iran and by the media. In the Islamic Republic of Iran, conversion to Christianity is punishable by death.

CHAPTER III

THE HUMAN RIGHTS COMMITTEE AND THE SANCTIONING OF HOSTILE BEHAVIOUR AND ISLAMIC LEGISLATION CONTRARY TO FREEDOM OF RELIGION OR TO THE RIGHTS OF RELIGIOUS MINORITIES

SUMMARY: A. Scope of the State's legal obligation. – B. Content and variety of infringing legislation. – C. Legislation on apostasy, blasphemy and defamation of religions: The direct condemnation of the criminalisation of apostasy and blasphemy; Indirect condemnation of the criminalisation of apostasy and blasphemy under Articles 6 and 7 of the Covenant; Defamation of religions. – D. Hate speech against religion or religious communities. Islamophobia. Violence motivated by religious hatred. – E. Death penalty and corporal punishment. – F. Law of retaliation, *qisâs*, and blood money, *diyah*. – G. Anti-terrorism and anti-extremism laws. – H. Laws violating Article 25 of the Covenant. Freedom of religious political parties. – I. Polygamy and early marriages. Discrimination between men and women, temporary or forced marriages. – J. Rights of children born out of wedlock. – K. Female genital mutilation and harmful practices against women and girls. Marital rape. – L. Criminal legislation convicting people on the basis of their sexual tendencies and gender identity. – M. Expulsion of homosexuals to a Muslim state that criminalises homosexuality. – N. Education and school curricula.

In Muslim countries as a whole, as a result of its deeply rooted and pervasive social privilege, Islam is generally recognised as having legal privileges of a political nature, such as the requirement that the Head of State must be a Muslim, or of a civil, family or criminal nature. It follows that for religious freedom, most Muslim countries are countries at risk. As a result, the Committee will have to delineate in a specific way the contours of freedom of religion in the area of Islamic civilization, starting with the scope of the legal obligation of the State.

A. *Scope of the State's legal obligation*

The first point about the scope of the State's legal obligation is that the State is not only responsible for acts directly attributable to it, but

also for acts that may be beyond its control, such as interfaith conflict or violence, or the activities of armed religious groups. In its concluding observations in the absence of a second report from Nigeria,[1] adopted on 19 July 2019, the Committee, in addition to the direct responsibility of the State arising from the intervention of its armed forces, expressed concern:

> […] about the violence and widespread human rights abuses committed by Boko Haram since 2009 in large parts of the north-east of the State party against the civilian population, including executions, abductions, torture, rape and the use of children in hostilities and for the commission of atrocities. (§ 30)

And in paragraph 31 on the recommendation, it recommends that the State party conduct impartial investigations into allegations of human rights violations

> committed in the context of the conflict with Boko Haram, both by non-State and State actors, in order to identify, prosecute and punish those responsible, and ensure that victims have access to effective remedies and full reparation.

The obligation to respect the Covenant is binding on the central State. The latter cannot avail itself of a decentralisation law to escape its obligations to respect freedom of religion and respect for pluralism. In its concluding observations on the initial report of Indonesia adopted on 23 and 24 July 2013,[2] the Committee states that:

> While noting the State party's efforts to devolve State authority pursuant to the policy on decentralization (Law No. 32 of 2004), the Committee regrets that the resultant autonomy of regions has led to the enactment of subnational legislation and by-laws that are inconsistent with the provisions of the Covenant. The Committee particularly regrets that regions have increasingly adopted by-laws and policies that are severely restrictive of the enjoyment of human rights and discriminate against women, such as those which promote interpretations of sharia law in Aceh that are inconsistent with the Covenant. The Committee is also concerned with reports that in Aceh province individuals must demonstrate the knowledge of or ability to read religious texts in order to be employed in the police service and in some other public institutions (arts. 2, 3, 18, and 26).

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[1] CCPR/C/NGA/CO/2.
[2] CCPR/C/IDN/CO/1.

The Committee refers the State party to paragraph 4 of its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties and reminds the State party that the obligations under the Covenant are binding on all State parties as a whole and at all levels. The State party must therefore ensure that legislation at all levels is compatible with the provisions of the Covenant. The Committee adds that:

> The State party should also review its policies and practices that may be interpreted as requiring adherence to the precepts of a particular religion for employment in a public service.

This is thus a way of condemning the privileges referred to above. The same positions are taken by the Committee with regard to other federal states, such as Nigeria. The latter has been called upon to put an end to discriminatory laws and practices that exist in some northern states of Nigeria against non-Muslim minorities. As for the material scope of the State's obligations, from the perspective of the implementation of Article 18, it mainly covers matters relating to family and criminal law and some civil procedural matters such as evidence.

The State's legal obligation also implies that the State's courts must therefore apply the Covenant and recognise it as a superior source of law. If there is an 'Islamic question', it is precisely because the Sharia courts do not recognise the Covenant, which is contrary to the legal obligation of the State. In the Concluding Observations of 25 July 2011 on the Initial Report of Ethiopia, a secular state,[3] the Committee highlighted this issue by stating that it:

> […] remains concerned by the fact that such courts can take binding decisions, which cannot be appealed against on the substance, in matters such as marriage, divorce, guardianship of minors, and inheritance. The Committee also notes that the Covenant is not part of the laws applied by the sharia courts.

The State party should ensure that all courts function in accordance with the principles set out in Article 14 of the Covenant and paragraph 24 of general comment No. 32 (2007), and religious courts should not

[3] Article 11 of the Constitution of Ethiopia (8 December 1994) is entitled "Separation of State and Religion". It states "(1) State and religion are separate. (2) There shall be no state religion. (3) The state shall not interfere in religious matters and religion shall not interfere in state affairs".

render enforceable judgements unless they comply, inter alia, with the fundamental requirements of fair trial and their judgements are validated by State courts in the light of the guarantees set out in the Covenant, including Article 14. This may be a crucial issue in multi-confessional states such as Lebanon.

B. *Content and variety of infringing legislation*

The freedom of religion protected by Article 18 can be infringed in different ways by state legislation. First of all, as noted by the Special Rapporteur on freedom of religion and belief in his aforementioned February 2018 report to the Human Rights Council,

> Religious discrimination does not only take place when an individual's right to manifest their religion or belief freely is restricted or interfered with by the State or non-State actors. It can also take place when an individual's enjoyment of other fundamental rights – for example the right to health, education, expression – is restricted or interfered with by State or non-State actors in the name of religion, or on the basis of a person's religion or belief.

For example, restrictions on inheritance law on the grounds of disparity of religion may indirectly affect freedom of religion.

In some of its concluding observations, the Committee has made a detailed survey of this type of legislation that infringes on freedom of conscience and religion. Mandatory registration of religious associations, restrictions on worship, control and monitoring of the press or religious publishing, verbal or physical attacks against religious minorities, pressure or intervention in the activities of ministers of religion, do not exhaust the list of violations of freedom of religion. Thus, in its concluding observations on the third periodic report of Tajikistan (18 July 2019),[4] the Committee notes the following restrictions:

> (a) interference with the appointment of imams and the content of their sermons; (b) control over books and other religious materials; (c) the requirement of State permission for receiving religious education abroad; […] (f) the regulations on wearing clothes during traditional or religious celebrations […] and the prohibition of certain attire in practice, such as the hijab.

[4] CCPR/C/TJK/CO/3

These are only partial considerations that do not take into account the variety of practices or laws that infringe on religious freedom. One of the most common forms of restrictions on religious freedom is the compulsory registration of religious communities or associations. The Committee considers that the compulsory registration of religious communities or associations is not compatible with Article 18 of the Covenant. In its concluding observations on the initial report of Turkmenistan,[5] the Committee expressed concern that the law obliges religious organizations to register and that the practice of religion without registration is subject to administrative sanctions, that private religious education at all levels and in the State is prohibited, and that the law strictly regulates the number of copies of religious texts that religious organizations may import.

In its concluding observations on the fifth periodic report of Uzbekistan, adopted on 27 March 2020,[6] the Committee followed the same line in extending the adverse effects of these laws on the registration of religious associations. It states:

> The Committee remains concerned that current legislation continues to criminalize proselytism and other missionary activities, as well as any religious activity by unregistered religious organizations. It also remains concerned about: (a) the persisting obstacles and burdensome requirements for the registration of religious associations and the repeated denial of registration of certain religious organizations; (b) the censorship of religious material and restrictions on its use; (c) the strict State control over religious education; (d) reports of arrest, detention, fines and criminal convictions of individuals belonging to unregistered religious groups for conducting peaceful religious activities; and (e) arbitrary arrests, detention, torture and ill-treatment and conviction of Muslims practising their religion outside the State-sanctioned structures on extremism-related charges or for association with prohibited religious groups.

C. *Legislation on apostasy, blasphemy and defamation of religions*

Some Muslim states, such as Iran, Saudi Arabia, Mauritania (art. 306 of the Penal Code), Sudan (art. 126 of the Penal Code), Pakistan, Afghanistan sanction apostasy with the death penalty. Other States, such as Morocco and Egypt, punish the apostasy of Muslims (see the case of Nasr Hamed Abou Zaïd, in Egypt, or the case of Mustapha Zéralda, in

[5] CCPR/C/TKM/CO/1.
[6] CCPR/C/UZB/CO/4.

Morocco).[7] The Human Rights Committee sanctions the criminalisation of apostasy and blasphemy insofar as it violates the freedom of religion under Article 18 of the Covenant or has a discriminatory effect on religious minorities within the majority religion. Such condemnation may be direct or indirect.

– *The direct condemnation of the criminalisation of apostasy and blasphemy*

As already indicated, a number of Muslim States criminalise the act of apostasy and sometimes punish it with the most severe penalties, including the death penalty – a situation that is constantly denounced by the Committee as contrary to Article 18. Thus, in its concluding observations on the initial report of Mauritania:

> The Committee remains concerned that the exercise of the freedom of conscience and religion is not formally guaranteed for Muslim Mauritanians, for whom a change of religion is classified as apostasy and punishable by the death penalty (arts. 2, 6, 18 and 19). The State party should amend legislative provisions that violate freedom of thought, conscience and religion, and freedom of expression, so as to comply with the requirements of articles 18 and 19 of the Covenant. It should guarantee to all, without exception, including non-believers and those who change religion, full enjoyment of freedom of thought, conscience and religion. The crime of apostasy should be abolished.[8]

The same approach is adopted in the concluding observations on the fifth periodic report of Sudan.[9] In paragraphs 49 and 50, the Committee expresses its concern about the crime of apostasy, provided for in Article 126 of the Penal Code. It calls upon the State party to repeal Article 126 of the Penal Code and to amend laws that infringe upon the freedom of thought, conscience and religion, as well as the freedom of expression, guaranteed by Articles 18 and 19 of the Covenant.

In its concluding observations on Pakistan adopted on 25 and 26 July 2017,[10] the Committee stressed that the provisions of the Pakistani Penal Code which punish blasphemy with the mandatory death penalty

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[7] Abdelfattah Amor, "Constitution and Religion in Muslim States", Nawaat, *https://nawaat.org/2005/02/07/constitution-et-religion-dans-les-etats-musulmans-4*.

In Morocco, Article 221 prohibits "any means of seduction with the aim of undermining the faith of a Muslim".

[8] CCPR/C/MRT/CO/2.

[9] CCPR/C/SDN/CO/5.

[10] CCPR/C/PAK/CO/1.

and which have a discriminatory effect on religious minorities, including members of the Ahmadiyya sect, should be repealed. To this end, the Committee states in paragraphs 33 and 34 of its concluding observations that it is concerned about the blasphemy laws which provide for harsh penalties, including the mandatory death penalty, and which reportedly have a discriminatory effect on Ahmadis, who are often convicted of blasphemy on false charges, and the violence against persons accused of blasphemy, as shown in the case of Mashal Khan.[11] The Committee also notes that judges hearing blasphemy cases are frequently subjected to harassment, intimidation and threats. While taking note of the judgment of the Supreme Court of 19 June 2014,[12] the Committee regrets, however, the lack of information on the implementation of this judgment and expresses concern about reports of hate speech and hate crimes against persons belonging to religious minorities and their places of worship, as well as about the content of textbooks and curricula in public schools and madrasas that convey religious prejudices. Therefore, the Committee calls upon the State party to repeal or amend all blasphemy laws; to bring to justice anyone who incites or engages in violence against others on the basis of allegations of blasphemy, or makes false accusations of blasphemy; and to take all necessary measures to provide adequate protection to all judges, prosecutors, lawyers and witnesses involved in blasphemy cases; to ensure that all cases of hate speech and hate crimes are promptly and thoroughly investigated and perpetrators prosecuted; to revise school textbooks and curricula to remove religious bias and incorporate human rights education, and to continue to regulate madrasas; and to fully comply with the Supreme Court ruling of 19 June 2014. The

[11] Mashal Khan, a Pashtun and Muslim student at Abdul Wali Khan University in Mardan, was lynched by mobs at the university on 13 April 2017, following allegations of blasphemous online publication.

[12] The Supreme Court was seized following the attack on an Anglican church in Peshawar that killed 81 people in September 2013 and attacks on the Kalash and Ismaili ethnic minorities in Chitral, Khyber Pakhtunkhwa province, by Muslim extremists. The President of the Court issued an order to establish a National Council for Minority Rights, protected by the Constitution. The Council is also responsible for making recommendations for the protection of minority rights. The ordinance provides for the establishment of a special police force to protect places of worship. "in all cases of violation of any of the rights guaranteed under the law or desecration of the places of worship of minorities, the concerned Law Enforcing Agencies should promptly take action including the registration of criminal cases against the delinquents". "[…] the Federal Government should take appropriate steps to ensure that hate speeches in social media are discouraged and the delinquents are brought to justice under the law", "appropriate curricula be developed at school and college levels to promote a culture of religious and social tolerance".

Committee's consistent attitude is to encourage States to decriminalise blasphemy, as in §§ 51 and 52 of its concluding observations on Bahrain's initial report, adopted on 19 July 2018.[13]

The Committee's attitude is not limited to laws on apostasy and blasphemy, which are, in themselves, prejudicial to freedom of thought, conscience and religion. It extends its control to all forms of restrictions or pressure on minority faiths. This emerges from the concluding observations on Algeria's fourth periodic report of 20 July 2018[14] through which the Committee: "reiterates its concern regarding article 11 of Ordinance No. 06-03 of 28 February 2006 on the conditions and rules governing non-Muslim worship, which criminalizes certain activities that could cause individuals to renounce the Muslim faith". Furthermore, the Committee expresses its concern at reports of the closure of churches or evangelical institutions, as well as restrictions on the exercise of Ahmadiyya worship. It also notes allegations of "attacks, acts of intimidation and arrests targeting persons who do not fast during Ramadan". In the Committee's view, such behaviour is contrary to both Articles 18 and 19 of the Covenant. Consequently, the Committee invites the State party to eliminate laws that violate freedom of thought, conscience and religion, not to hinder the exercise of worship by believers who do not observe the official religion, "for example by destroying and closing schools or refusing to register religious movements if the refusal is not based on requirements of necessity and proportionality;" to guarantee to all, "including those who are atheists or have renounced the Muslim faith, are able to fully exercise their freedom of thought, conscience and religion".[15]

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[13] CCPR/C/BHR/CO/1. The Committee: "51 […] notes that under article 22 of the State party's Constitution, "freedom of conscience is absolute", but it is concerned about the existence of practices that adversely affect the exercise of the right to freedom of religion or belief enshrined in article 18 of the Covenant. In particular, the Committee is concerned about reports that members of the Shia community have been subjected to restrictions of their rights to worship and profess their religious beliefs and that liberty of conscience is not effectively guaranteed (art. 18)".

"52. The State party should decriminalize blasphemy and guarantee that all people within its territory can fully enjoy the right to freedom of conscience, religion or belief enshrined in article 18 of the Covenant. In particular, it should eliminate discriminatory practices that violate the right to freedom of religion or belief, including by stepping up its efforts to ensure that the Shia population is fairly represented in the public and political spheres. The State party should take immediate steps to ensure that the Shia population is effectively protected from discrimination in every field".

[14] CCPR/C/DZA/CO/4.

[15] The Committee observes the same attitude in its concluding observations on the fifth periodic report of Iraq of 4 November 2015, in which it states: "The Committee is concerned

– *Indirect condemnation of the criminalisation of apostasy and blasphemy under Articles 6 and 7 of the Covenant*

As we stated previously, in considering cases of deportation or expulsion to Muslim states of Muslim asylum-seekers who have converted to Christianity, the Committee has had the opportunity to clarify its views on the freedom to leave one's religion, which constitutes a condemnation of laws sanctioning apostasy.

In its Views on communication No. 2345/2014 of 14 March 2019, after recalling its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, in which it refers to the obligation of States parties not to extradite, remove, expel or otherwise transfer a person from their territory, if there are substantial grounds for believing that there is a real risk of irreparable harm such as that contemplated by Articles 6 and 7 of the Covenant, the Committee notes that the author was baptized and regularly attended religious services in Denmark between June 2013 and his return to Afghanistan in February 2014, and that the Refugee Appeals Board concluded that he was not sincere about his conversion to Christianity. However, the Committee is of the view that even where the authorities conclude that the conversion is insincere, they should assess whether, in the circumstances of the case, the claimant's conduct and the activities he engaged in in connection with or to justify his conversion, including church attendance, baptism and proselytising, could have serious negative consequences in the country of origin, such as to expose him to a risk of irreparable harm.[16] The State should not judge the conversion per se, but its effect on the asylum seeker's situation after expulsion. In other words, the freedom to convert may, through a combination of Articles 6 and 7 with Article 18, lead to a violation of the Covenant. In the present case, the Committee found that the author's deportation to Afghanistan did not give rise to a violation of his rights under Articles 7 and 18, for lack

about the existence of legal provisions and practices that may adversely affect the exercise of the right to freedom of religion or belief enshrined in article 18 of the Covenant. In particular, it is concerned about the affirmation by the State party that persons in Iraq have the right to change their religion "but only to Islam" and that Law No. 105 prohibiting the practice of the Baha'i faith remains in force (art. 18). […] The State party should guarantee that all people within its territory can fully enjoy their right to freedom of religion or belief enshrined in article 18 of the Covenant. In particular, it should eliminate discriminatory legislation and practices that violate the right to freedom of religion or belief".

[16] *S. A. H. v. Denmark* (CCPR/C/121/D/2419/2014), para. 11.8.

of evidence. However, as a matter of principle, the Committee's position cannot be doubted.[17]

– *Defamation of religions*

Some legislation penalises defamation of religions. This extremely vague notion can give rise to all sorts of abuse. It is for this reason that the Committee criticises such legislation. This type of restriction is both contrary to Article 18, in that it establishes ideological and religious monopolies, threatens religious minorities, but may also affect other freedoms and rights. For example, in the concluding observations on the initial report of Indonesia,[18] the Committee states in paragraph 25:

> The Committee regrets that Law No. 1 of 1965 on defamation of religion, which prohibits the interpretations of religious doctrines considered divergent from the teachings of protected and recognized religions, the 2005 edicts by the Indonesian Ulema Council and the 2008 Joint Decree by the Minister for Religious Affairs and others, unduly restrict the freedom of religion and expression of religious minorities, such as the Ahmadiyya.

Despite the decision of the Constitutional Court confirming the constitutionality of Law No. 1 of 1965 on defamation of religions, the Committee considers that the aforesaid law is incompatible with the provisions of the Covenant and should be repealed without delay. The Committee reaffirms the position stated in paragraph 48 of its general comment No. 34 that:

> 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 envisaged in article 20, paragraph 2, of the Covenant. […] 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.

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[17] In another case, Communication 2494/2014 (Views of 14 March 2019), the author, an asylum seeker in Denmark, claims that if he returned to the Islamic Republic of Iran, he would be at risk of persecution, in violation of Articles 6 and 7 of the Covenant, because he converted to Christianity, thus violating Sharia law. The author claims that he would be persecuted by the Iranian authorities because of his conversion from Islam to Christianity. Again, the communication was dismissed for lack of evidence.

[18] CCPR/C/IDN/CO/1.

D. *Hate speech against religion or religious communities. Islamophobia. Violence motivated by religious hatred*

In the field of hate speech or violence motivated by religious hatred, the responsibility of the State can be engaged either through acts directly attributable to it, or through its passivity or even complicity towards the individuals or groups responsible for the hate speech or acts of violence. The latter case could be part of the State's general obligation to protect its population.

In its concluding observations on the initial report of Indonesia, already cited:

> The Committee is concerned at reports suggesting failure on the part of State authorities to protect victims of violent attacks motivated by religious hatred, such as the attack on members of the Shia group on Madura Island in August 2012. It is further concerned about the lenient penalties imposed on the perpetrators of violent attacks motivated by religious hatred, such as the 12 perpetrators of the attacks against members of the Ahmadiyya group at Cikeusik, Banten in February 2011 (arts. 2, 6, 7 and 26). The State party should take all measures to protect victims of religiously motivated attacks; to investigate and prosecute the perpetrators of these attacks and ensure that, if the perpetrators are convicted, appropriate sanctions are imposed; and to provide victims with adequate compensation.

Similarly, in paragraph 22 of its concluding observations on the initial report of Turkey (30 October 2012), the Committee expressed concern about reports of hate crimes against non-Muslim religious communities and the persistence of hate speech in the media that is not punished. It calls upon the State to intensify its efforts to effectively prohibit hate speech contrary to Article 20 of the Covenant.

The Committee consistently denounces Islamophobia, racism, xenophobia and anti-Semitism. Whether manifested in the form of ideologies, political parties, demonstrations or social behaviour, such behaviour and ideas are contrary to the Covenant, in particular Articles 2, 20 and 26.

In its concluding observations on the seventh periodic report of the Russian Federation adopted on 31 March 2015,[19] the Committee expresses its concern about Islamophobia, anti-Semitism, racism and xenophobia of certain neo-Nazi or Islamophobic Slav nationalist groups. It calls upon the State party to strengthen its efforts to combat all acts of

[19] CCPR/C/RUS/CO/7.

racism, xenophobia, Islamophobia and anti-Semitism, including in political discourse and in the mass media.[20]

E. *Death penalty and corporal punishment*

Except in respect of minors or pregnant women, the death penalty is not considered, per se, to be contrary to Article 6 of the Covenant on the right to life. However, the general spirit of the Covenant, while not outright abolitionist, remains extremely restrictive with regard to the death penalty, as is apparent from Article 6 (2):

> In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide.

It would not be wrong to assert that the Pact is potentially abolitionist. The majority of Muslim countries have not abolished the death penalty for both socio-political and religious reasons. For this reason, with the exception of Azerbaijan and Turkmenistan, Islamic states have not ratified the Second Optional Protocol to the Covenant on "International Commitment to Abolish the Death Penalty". Indeed, the Doctors of Law in Islam, *fuqahâ*, accept the death penalty, both on the basis of the Koranic text (armed rebellion, homicide), and the prophetic hadiths, (apostasy, adultery, homosexuality), and on the basis of the discretionary power of the prince or judge – *ta'zîr.* Corporal punishment (flogging, caning, amputation, crucifixion, burning at the stake) is also allowed on the same grounds. It should be noted, however, that they are the subject of great differences of interpretation among the Doctors of Islamic Law. With regard to the death penalty, the Committee follows the abolitionist trend of the Covenant. With regard to corporal punishment, it expresses

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[20] "The State party should strengthen its efforts to combat all acts of racism, xenophobia, Islamophobia and anti-Semitism, including in political discourse and in the mass media by, inter alia:

(a) Instituting awareness-raising campaigns aimed at promoting respect for human rights and tolerance for diversity;

(b) Addressing effectively the illegal activities of extremist organizations and groups and the Cossack patrols;

(c) Thoroughly investigating alleged hate crimes under the relevant provisions of the Criminal Code, punishing such acts with appropriate sanctions and providing victims with adequate remedies, including compensation".

a frankly hostile attitude, inspired by Article 7 of the Covenant, insofar as, in the Committee's view, corporal punishment is "by its very nature" contrary to Article 7 of the Covenant. For example, in its concluding observations on the initial report of Indonesia (§15), the Committee expressed clear opposition to corporal punishment:

> The Committee regrets the use of corporal punishment in the penal system, particularly in Aceh province, where the Acehnese Criminal Law (Qanun Jinayah), inter alia, provides for penalties that violate article 7 of the Covenant, such as flogging, for offences against the *qanun* (by-law)governing attire, the *qanun khalwat* (prohibiting a man and a woman from being alone in a quiet place) and the *qanun khamar* (prohibiting the consumption of alcohol). The Committee also regrets that the execution of these sentences by sharia police (Wilayatul Hisbah) disproportionately affects women.

The State party is therefore called upon to repeal the Aceh Criminal Law and prevent the use of corporal punishment.

In its Concluding Observations (paragraphs 24, 25, 28 and 29) on the second periodic report of Mauritania, the Committee adopts the same hostile logic to the death penalty and corporal punishment. Despite the de facto moratorium observed by the State party since 1987, the Committee is nevertheless concerned about the large number of crimes, which do not belong to the category of the most serious crimes and for which the death penalty continues to be provided. The Committee also regrets the amendment of Article 306 of the Criminal Code, which introduces the mandatory death penalty for "blasphemous statements" and "sacrilege". It also expresses concern about the possible use of execution by stoning. In light of these concerns, the Committee recommends that the State party revise the Criminal Code to bring it into strict conformity with Article 6 (2), of the Covenant and limit crimes punishable by death to "the most serious crimes involving intentional killing"; abolish stoning as a method of execution from the Criminal Code; initiate a political and legislative process aimed at abolishing the death penalty, and introduce public awareness-raising measures and campaigns for its abolition. With regard to corporal punishment, the Committee notes that the Penal Code still contains provisions permitting corporal punishment such as flogging and amputation, which by their very nature constitute a serious violation of Article 7 of the Covenant. It recommends that the State party repeal these provisions of the penal code that violate the Covenant. The Committee follows the same line in its concluding observations on the

fifth report of Yemen[21] and Sudan.[22] The Committee does not take into account the fact that in reality these penalties are not applied. In this case, it sticks to the legislation and denounces its incompatibility with the Covenant.

F. *Law of retaliation,* qisâs*, and blood money,* diyah

Corporal punishment for intentional crimes can be inflicted on the basis of the law of retaliation, recognised by several verses of the Koranic text, notably verse 178 of the Cow Sura:

> O you who believe! You have been prescribed retaliation for the slain: free man for free man, slave for slave, woman for woman. But he to whom his brother has in some way forgiven must face a suitable petition and must pay damages of good grace. This is a relief from your Lord, and a mercy. Therefore, whoever after this transgresses will suffer a painful punishment.[23]

For unintentional offences, causing death or bodily harm, Islamic Shariah law allows an absolute pecuniary penalty called diyah, commonly translated as *blood money.*

In paragraph 17 of its concluding observations on the fourth periodic report of Libya adopted on 30 October 2007, the Committee states:

> The Committee notes with concern that the law of retaliation (*qisas)* and blood money (*diyah*) are still practised and that the provisions relating thereto are still in force, which may contribute to impunity (arts. 2, 7, 10, 14). The State party should review the laws and practice relating to retaliation (*qisas*) and blood money (*diyah) in the* light of the provisions of the Covenant.

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[21] 20. The Committee is concerned that corporal punishment, i.e., flogging, amputation and stoning, is provided for by law as a form of penal sanction. The Committee is also concerned at reports that corporal punishment is used on children outside the judicial sphere, such as in the family and in schools (arts. 6, 7 and 24).

The State party should take concrete steps to end the practice of corporal punishment in all settings. It should encourage the use of non-violent means of discipline as an alternative to corporal punishment and should conduct information campaigns to raise public awareness of the harmful effects of corporal punishment".

[22] In its concluding observations on the fifth periodic report of the Sudan, the Committee: "urges the State party to amend article 27 of the Criminal Code, so as to revoke stoning and crucifixion as an officially sanctioned punishment under the national law of the State".

[23] Translation: Mohammed Hamidulla.

We note that the Committee, while citing Articles 2, 7, 10 and 14 of the Covenant, however, examines the issue exclusively from the perspective of impunity and not from the perspective of its incompatibility with Articles 6 and 7 of the Covenant. However, while blood money has an exclusive bearing on the issue of impunity, the same cannot be said of retaliation, which may be incompatible with the right to life and physical integrity of the person.

G. *Anti-terrorism and anti-extremism laws*

Various anti-terrorist and anti-extremism laws are passed in virtually every country in the world. However, these laws can be used as a pretext for the repression of certain religious minorities or for religious freedom. An overly broad definition of the concept of "terrorism" can lead to such an outcome. Definitions of extremism can also lead to excesses. The Committee has often stressed that anti-terrorist laws and laws against extremism should not become an open door to infringements of religious freedom. In paragraph 23 of its concluding observations on the third periodic report of Tajikistan, adopted on 18 July 2019,[24] the Committee expresses its concern that:

> (a) the broad and vague definitions of terrorism (Counter-Terrorism Act of 1999), extremism (Anti-Extremism Act of 2003) and public justification of terrorist and extremist activity (amendments to the Criminal Code adopted on 14 November 2016) that may lead in practice to arbitrariness and abuse; (b) the reported misuse of such legislation to limit and repress the freedom of expression of political dissidents and religious groups.

The State is invited to bring its legislation and practice into line with the Covenant, inter alia, by providing a more precise and less broad definition of terrorism and extremism (including by adding the criteria of violence or incitement to hatred) and "ensure that these concepts are in conformity with the principles of legal certainty and predictability and relevant international standards, and that any restrictions imposed on the exercise of human rights in the interests of national security are necessary and proportionate to legitimate objectives and are subject to adequate safeguards".[25] The same approach is followed in paragraphs 20 and 21 of

[24] CCPR/C/TJK/CO/3.

[25] In paragraphs 14 and 15 of its concluding observations on the second periodic report on Turkmenistan (23 March 2017), the committee affirms: "The Committee is con-

the concluding observations on the fifth periodic report of Uzbekistan adopted on 27 March 2020.[26]

H. *Laws violating Article 25 of the Covenant. Freedom of religious political parties*

All of these laws on terrorism, extremism and the registration of religious communities and associations are often used by states to restrict freedom of religion and conscience. States such as Kyrgyzstan, Turkmenistan and Azerbaijan provide a strong argument to justify their laws. This is the argument derived from the development and danger of extremist Islamist movements, groupings and parties. But for the Committee, this argument alone is not sufficient to justify these restrictions. In its concluding observations on the third periodic report of Tajikistan adopted on 18 July 2019, the Committee stressed that the constitutional ban on political parties of a religious or ethnic nature introduced in 2016 raises issues of compatibility with the Covenant, as it is likely to undermine political pluralism and the freedoms to be enjoyed by the opposition. This is combined with the harassment of leaders of the Islamic Renaissance Party, with long prison sentences following unfair trials held behind closed doors. In the same vein, the Committee notes the existence of persecution targeting members of "Group 24", an opposition

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cerned about the excessively broad definition of extremism under the State party's legislation, which leads to arbitrary and disproportionate restrictions of the rights in the Covenant in practice (arts. 2, 9, 18, 19, 21 and 25). 15. The State party should bring its counter-extremism legislation and practices into full compliance with its obligations under the Covenant by, inter alia, narrowing the broad range of activities considered extremist and ensuring their conformity with the principles of legal certainty, predictability and proportionality, and by ensuring that the definition of extremism contains an element of violence or advocacy of hatred".

[26] "20. The Committee is concerned about the overly broad and vague definitions contained in the Law on Combating Extremism, in particular those of "extremism", "extremist activities" and "extremist materials", and the use of this legislation to unduly restrict the freedoms of religion, expression, assembly and association, in particular of political opponents and religious groups not approved by the State (arts. 2, 18, 19, 21 and 22).

21. The State party should bring its current legislation and practice on combating extremism into full compliance with its obligations under the Covenant, including its obligations under the Covenant: (a) Clarifying and specifying the definitions and general principles contained in the Law on Combating Extremism, ensuring their conformity with the principles of legal certainty, predictability and proportionality, and ensuring that the definition of extremism includes a reference to violence or advocacy of hatred; (b) Ensuring that any limitations on Covenant rights imposed pursuant to such legislation have legitimate objectives, are necessary and proportionate and are subject to appropriate safeguards".

movement declared to be "extremist", which has manifested itself, inter alia, in prosecutions, convictions and the alleged enforced disappearance of Ehson Odinaev in 2015, and the fact that family members of activists belonging to an opposition group or individuals associated with such groups are subjected to serious forms of harassment and are often imprisoned. All these practices are contrary to both the freedom of association guaranteed by Article 22 of the Covenant and Article 25 on free participation in public affairs. The Committee also notes that the current electoral framework unduly restricts the right to stand for election by depriving of this right any person declared incompetent by a court and any person serving a prison sentence.

I. *Polygamy and early marriages. Discrimination between men and women, temporary or forced marriages*

For the Committee, polygamy constitutes an affront to dignity, as well as a form of discrimination against women. In its concluding observations on the second periodic report of Kuwait, cited above, the Committee emphasized this principle with reference to general comment No. 28 (2000). For this reason, it is contrary to Articles 2, 3, 23(4) and 26 of the Covenant. As for early marriage, it is contrary to Articles 23 and 24. For example, in its concluding observations of 19 July 2018 on Bahrain, the Committee considers that polygamy is contrary to Articles 2, 3, 23, 24 and 26 of the Covenant. In paragraphs 17 and 18 of its concluding observations the Committee:

> […] regrets the persistence of polygamy in the State party, which is regulated in the Family Code of 2017. Despite the State party's assertion that early marriage is not widespread and that the Family Code sets the minimum age for marriage at 16 years with certain exceptions, the Committee is concerned by reports that the practice of early marriage continues.

Accordingly, the State is called upon to roll back polygamy with a view to achieving its abolition; to set the minimum age of marriage at 18 years for both girls and boys and to amend legal provisions that provide for exceptions to this minimum age.

Following its consideration of the initial report of Indonesia, the Committee elaborated in paragraph 29 of its concluding observations detailed concerns and recommendations on these issues of polygamy and early marriage. It states in this regard:

> The Committee is concerned about reports of the extent of the practice of polygamy and the fact that the minimum age of marriage is 16 years for girls and 19 years for boys. The Committee is also concerned about the persistence of early marriages of girls in the State party (arts. 2, 3, 24 and 26).

In the Committee's view, the fact that a woman can obtain a divorce in the event of her husband's remarriage does not mitigate the incompatibility of polygamy with the provisions of the Covenant. Similarly, the Committee does not allow itself to be stopped by the argument of some States that polygamy is not expressly prohibited by the Covenant. In this regard, the Committee states in its concluding observations on the fifth periodic report of Sudan,[27] adopted on 25 October 2018:

> While noting the information provided by the State party according to which a wife has the right to seek divorce if adversely affected by polygamy, the Committee is concerned about the persistence of the practice in the State party. It is further concerned about the State party's assertion that polygamy is not prohibited under the Covenant, and regrets the lack of statistical data on this practice and its effects on women.

Recalling further its general comment No. 28 (para. 24), in which it emphasizes that polygamy is incompatible with equal treatment between men and women, as it violates the dignity of women, the Committee requests the State party to take the necessary measures to abolish polygamy, in law and in practice.

In general, family law and personal status law in Islamic countries are based on Muslim law and contain provisions that discriminate against women. The Committee consistently denounces unequal legislation against women. Thus, in the concluding observations on the sixth periodic report of Morocco adopted on 2 November 2016:

> The Committee welcomes the recognition of the principle of equality in the Constitution of 2011 but is still concerned, however, about: (a) the continued existence of legislative provisions that discriminate against women, particularly as regards a matrimonial regime that continues to permit polygamy, divorce, child custody, legal guardianship of children, inheritance and the transmission of nationality to a foreign spouse; (b) the high number of polygamous marriages; and (c) the increase in early marriages.

In the Committee's view, all this legislation is contrary to Articles 2, 3, 23, 24 and 26 of the Covenant.

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[27] CCPR/C/SDN/CO/5.

The Committee observes the same attitude in the concluding observations on the fifth periodic report of the Sudan. While welcoming the plans to review the Personal Status Laws, it remains concerned:

> […] about the persistence of entrenched discriminatory provisions within the Personal Law Act of 1991, such as article 25 (c), which provides that the contract of marriage for a woman shall be concluded by a male guardian; article 34, which allows for the marriage of a pubescent woman to be concluded by a male guardian; and article 40 (3), which allows the conclusion of the marriage of a minor girl, if it can be proven that the marriage will "benefit" the girl. The Committee also remains concerned about the persistence, despite its previous recommendation […] of the discriminatory and vaguely defined offence of "immodest attire" in article 152 of the Criminal Code, punishable by flogging.

In its recommendation, the Committee calls upon the state party to repeal without delay the discriminatory provisions of the Personal Status Law; to ensure that the minimum age of marriage is set at 18 years for both girls and boys; to ensure civil registration of all marriages; to intensify its efforts to eradicate forced marriages and related harmful practices; and to ensure that victims are adequately compensated and provided with rehabilitation measures; to repeal Article 152 of the Criminal Code; to continue to increase women's participation in public life, in particular their representation at the highest levels of government and in the judiciary; to provide appropriate training, targeting law enforcement officials, judges, lawyers and prosecutors, with a view to eliminating gender stereotypes regarding the subordination of women to men and the respective roles and responsibilities of women and men in the family and society.

The Committee consistently condemns personal status laws or certain religiously motivated practices that are contrary to the Covenant's provisions on non-discrimination in relation to acquisition of nationality, marriage, succession and guardianship. For example, in its concluding observations on Nigeria, the Committee stated that it is: "particularly concerned about legal provisions and practices that discriminate against women, including with regard to the transmission of nationality, and polygamy, repudiation, adultery and inheritance rights in the states that apply sharia law, and discriminatory traditional practices". It therefore recommends that the State:

> […] take steps, including a comprehensive review of the legislation, to ensure that women are not subjected to any form of discrimination, in law

> and in practice, inter alia in matters of access to justice, education, employment, land and property rights, marriage and transmittal of nationality. It should: (a) harmonize its national laws with the provisions of the Covenant, including by repealing discriminatory provisions relating, inter alia, to marriage, polygamy, repudiation, divorce, succession and landownership; (b) conduct public awareness campaigns aimed at eliminating gender biases and stereotypes regarding the roles and responsibilities of men and women in the family and society, and promote gender equality and non-discrimination […]

Same attitude was expressed during the consideration of the third periodic report of Algeria.[28]

Prohibited by the Sunnis, but allowed by the Shiite Imamites, temporary marriage, *zawâj mu'aqqat*, also called *zawâj Mut'a* (marriage of enjoyment) is a contract between a man and a woman, with a view to having marital sexual relations, therefore legitimate, but for a determined period of time which may vary according to the will of the spouses. Since polygamy is allowed, a married man is therefore entitled to enter into a temporary marriage. On the other hand, this right is obviously not recognised for married women who, in order to be able to conclude this type of marriage, must be single, widowed or divorced. In practice, this temporary marriage may have the effect of legitimizing prostitution or, more seriously, of covering up the practice of trafficking in persons for the purpose of sexual exploitation. In its Paragraph 20 of its concluding observations on the third periodic report of the Islamic Republic of Iran, adopted on 2 November 2011, the Committee states that the "Committee is concerned about the persistent trafficking in women and children, particularly young girls from rural areas, often facilitated by temporary

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[28] In its concluding observations of 1 November 2007:

"20. While noting the State party's desire to amend its laws and engage in reflection on the status of women in Algeria, the Committee notes with concern the persistence of discrimination against women in both practice and law, particularly in relation to marriage, divorce and adequate participation in public life (Covenant, arts. 3, 23, 25 and 26).

The State party should:

(a) Expedite efforts to bring the laws on the family and personal status into line with articles 3, 23 and 26 of the Covenant, particularly with regard to the institution of the *wali*, (guardian) the rules on marriage and divorce – especially the non-attribution of housing to divorced women without children – and decisions concerning custody of children. In addition, the State party should abolish polygamy, a practice which is an affront to women ' s dignity and is incompatible with the Covenant;

(b) Step up its efforts to increase awareness of women's rights among the Algerian population, to promote women' s participation in public life, to improve access for women to education and to guarantee them access to employment opportunities".

marriages (*siqeh*)". Similarly, in paragraph 10 of its concluding observations on the fifth periodic report of Yemen of March 2012, the Committee states that: "While acknowledging the State party's announced efforts in eradicating the practice of temporary marriage, the Committee remains concerned about the persistence of this practice aimed at sexually exploiting young girls". Therefore, in its recommendation, the Committee urges the State party to "eradicate the use of temporary marriage for the sexual exploitation of children" The Committee follows the same approach in its concluding observations on the fifth periodic report of Iraq adopted on 5 November 2015, in which it condemns temporary and forced marriages. Although the Committee has not had the opportunity to rule on the compulsory wearing of the headscarf in some Muslim countries such as Iran, there is no doubt that such coercion would be considered contrary to the Covenant. It should be recalled that in 2019, in a communication to the Government of the Islamic Republic of Iran, the Special Rapporteur expressed his concern about the law on the mandatory wearing of the headscarf and his concern about the arbitrary arrest, enforced disappearance and detention of women's rights defenders who have challenged this law.[29]

J. *Rights of children born out of wedlock*

In classical Muslim law and in several legislations of Islamic countries, a child born out of wedlock has no rights. Son of *Zina* (sexual relationship outside marriage), he is considered as the fruit of sin and is subject to social stigmatisation and legal non-recognition. This issue was raised during the consideration of Indonesia's initial report. Firstly, it should be recalled that on 12 February 2012, the Indonesian Constitutional Court issued a decision that improves the status of children born out of wedlock in matters of inheritance (Decision No. 46/PUU-VIII/2010), the execution of this decision has been blocked. In this regard, the Committee affirms:

> The Committee welcomes Constitutional Court Decision No. 46/PUU-VIII/2010 of 17 February 2012, which clarifies the Marriage Act No. 1 of

[29] Human Rights Council, Forty-third session, 24 February-20 March 2020, Agenda item 3: Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. Gender-based violence and discrimination perpetrated in the name of religion or belief. Report of Special Rapporteur Ahmed Shaheed, on freedom of religion or belief. (§ 26).

> 1974 with regard to the inheritance rights of children born out of wedlock. However, the Committee notes with concern the lack of initiative to revise the law, which leaves room for the public and the authorities to interpret and apply the decision of the Constitutional Court (arts. 2 and 24). In the light of the Constitutional Court's decision on the right of children born out of wedlock to inheritance, the Committee urges the State party to take legislative measures to revise the Marriage Act and applicable legislation in accordance with the decision of the Constitutional Court and the provisions of the Covenant.[30]

K. *Female genital mutilation and harmful practices against women and girls. Marital rape*

Genital mutilation, such as excision, is practiced in many Arab, Asian, and African countries. In most cases it is a simple social custom enshrined in centuries-old traditions. Obviously, the argument of the States Parties to the Covenant is that they do not have the necessary latitude of action to be able to redress these customs that are detrimental to the dignity of women and their free consent to the consumption of the sexual act. The Committee does not accept this justification and consistently denounces the practice of genital mutilation and marital rape.

For example, in its concluding observations on the initial report of Djibouti adopted on 29 October 2013:[31]

> The Committee notes with regret the continuing reports of gender-based violence against women and harmful traditional practices, especially the practice of female genital mutilation. It is alarmed that the State party has confirmed that, despite numerous policy measures taken to enforce legislation that prohibits such mutilation, 93 per cent of women of childbearing age have undergone it. The Committee regrets that impunity for perpetrators of this unlawful and harmful practice still prevails (arts. 2, 3, 7 and 26). The State party should increase its efforts to end and eradicate such harmful practices as female genital mutilation through targeted awareness-raising and education programmes, as well as through the application of the criminal law.

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[30] In 2014, the Committee on the Rights of the Child, welcomed the adoption of "The revision of Article 43 (1) of Law No. 1/1974 on Marriage pursuant to Decision No. 46/PUU-VIII/2010, issued by the Constitutional Court on 17 February 2012, which extends the legal status of children "born out of wedlock".

[31] CCPR/C/DJI/CO/1.

Similarly, in its concluding observations on the fifth periodic report of Yemen (para. 9) adopted in March 2012,[32] the Committee:

> The Committee regrets the State party's inertia in matters related to discriminatory practices affecting women and the persistence of domestic violence. It is particularly worried at the responses provided by the delegation which maintains that female genital mutilation is a traditional practice, is difficult to eradicate and is not yet prohibited. The Committee also regrets the delegation's statement that marital rape does not occur and that the response given to the phenomenon of domestic violence merely consists in providing victims with temporary shelters. No attention has been given to the criminalization of these phenomena, the prosecution of alleged perpetrators and their sentencing if found guilty (arts. 2, 3, 6, 7 and 26).

Accordingly, the State party is invited to intensify its efforts to put an end to traditions and customs that are discriminatory and contrary to Article 7 of the Covenant, and to organize awareness-raising campaigns to that end. It is also recommended that the State party criminalize the practice and ensure that those who practise female genital manipulation are brought to justice. Similarly, the State party is invited to criminalize marital rape and other forms of domestic violence. As these social issues are closely linked to culture and morals, the State party is also called upon to promote a culture of human rights in society and a better understanding of women's rights.

By Regulation No. 1636 of 2010, the Indonesian government, in order to avoid the risks of disability or death, decided to medicalize the practice of excision. However, the Committee has made it known that it is not only the method of excision that is to be condemned, but the principle itself of the use of genital mutilation. Therefore, for the Committee, medicalisation, even if approved by religious authorities, does not solve the problem and must be condemned. In this sense, the Committee affirms that it:

> […] regrets the State party's issuance of Regulation No. 1636 of 2010, following a fatwa(ruling) by the Ulema Council, which permits medical practitioners to perform female genital mutilation (FGM), including on 6-month-old babies. The Committee regrets the State party's explanation that a previous ban against FGM led to an increase in its practice by non-medical practitioners, exposing women to grave risks of harmful forms of FGM and that the current regulation would better protect women.

[32] CCPR/C/YEM/CO/5.

Although such a move is open to discussion, the Committee called on the State to repeal the regulation in question.

The same position was adopted in the concluding observations on Nigeria on medicalized female circumcision.[33] In this regard, the Committee expresses concern: "about reports of widespread gender-based violence, including rape, and the prevalence of harmful traditional practices against girls and women, including female genital mutilation, especially its medicalization".

In some countries, genital mutilation is condemned by law but is still predominant in public mores. Thus, in the case of Mauritania, the Committee welcomes the General Child Protection Code and of Act No. 2017-025 of 15 November 2017:

> […] which prohibit and punish female genital mutilation performed on girls under the age of 18 years. It also welcomes the adoption of the national strategy to promote the abandonment of female genital mutilation for the period 2016–2019. Although the overall prevalence of the practice has fallen in recent years, the Committee remains concerned by its persistence on a major scale in some regions and among some ethnic groups. Furthermore, the Committee notes with deep concern that child marriage remains very common, despite the implementation of the national action plan to promote the end of child marriage for the period 2014–2016 and associated activities.

In its recommendations (paragraph 21) the Committee recommends that the State party:

> (a) Amend its legislation to prohibit the practice of female genital mutilation against all women and girls; (b) Ensure that all cases of female genital mutilation are promptly investigated and prosecuted, that perpetrators and accomplices are appropriately punished and that victims have access to social and medical services; (c) Strengthen awareness-raising and education programmes with a view to eradicating the practice; (d) Amend the Personal Status Code in order to prohibit marriage under the age of 18 years, without exception, and take all necessary steps to eliminate child marriage.

It is therefore clear that even where the practice of genital mutilation is subject to criminal code reforms and sanctions, the Committee remains concerned about the persistence of this harmful practice in practice.[34]

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[33] CCPR/C/NGA/CO/2.

[34] For example, in its concluding observations on the fifth report of the Sudan, the Committee stated that "the Committee is concerned about the lack of a clear and comprehensive definition of the right to health:

In patriarchal and macho conceptions of the family, the husband has the wife's body at his disposal, as he sees fit. Some Doctor of Law, in the classical Muslim law of the four schools, define marriage primarily as the possession by the man of the woman's body for the purpose of enjoyment.[35] In other words, and from this perspective, the idea of marital rape is inconceivable, the woman being purely the object of pleasure and mere bearer of future virility. The Committee rejects this corporal conception of marriage and adopts a moral and modern conception based on the equality of rights and duties between spouses in the conjugal relationship. On this basis, it equates marital rape with rape itself and condemns it in the same way. Thus, in its concluding observations on the fifth periodic report of Yemen adopted in March 2012:[36]

> The Committee regrets the State party's inertia in matters related to discriminatory practices affecting women and the persistence of domestic violence. […] The Committee also regrets the delegation's statement that marital rape does not occur and that the response given to the phenomenon of domestic violence merely consists in providing victims with temporary shelters. No attention has been given to the criminalization of these phenomena, the prosecution of alleged perpetrators and their sentencing if found guilty […]. The State party should criminalize marital rape and other forms of domestic violence, prosecute alleged perpetrators of such crimes and sentence them in a manner which is proportionate to the nature of the crime committed. The State party should promote a human rights culture within society along with greater awareness of the rights of women, especially the right to physical integrity. It must also take more effective action to prevent and punish domestic violence and provide assistance to the victims.

While noting the information provided by the State party that the Criminal Code is being reviewed to criminalize female genital mutilation and welcoming legislation adopted in seven states in the State party prohibiting and punishing the practice, as well as the ongoing implementation of the national strategy for the elimination of female genital mutilation 2008-2018, the Committee regrets the absence of disaggregated data on the prevalence of the practice, indicating the number of complaints received and the investigations undertaken. The Committee also regrets not being provided with information on the sanctions envisaged in the amendments under way and the rehabilitation measures contemplated (arts. 3, 7, and 24).

(26) The State party should ensure that the necessary amendments to the Criminal Code are adopted swiftly to criminalize female genital mutilation throughout its territory, with sanctions commensurate with the gravity of the offence and adequate compensation for victims. The State party should guarantee that victims of these practices have access to rehabilitation services".

[35] See *Kuwaiti Encyclopaedia of fiqh*, volume 40, p. 205.

[36] CCPR/C/YEM/CO/5.

L. *Criminal legislation convicting people on the basis of their sexual tendencies and gender identity*

This protection could apply to sexual minorities, homosexuals, transgender, lesbians. Indeed, some Muslim states, inspired both in their social context and by the precepts of Sharia law, severely condemn what they consider to be sexual deviations or perversions contrary to nature, social morality and religion. In Iran, Saudi Arabia, Yemen, Nigeria (northern states) and Somalia, the penalty can go as far as the death penalty. In Sudan, the death penalty for homosexuality was abolished in July 2020.

The Committee considers that this legislation is doubly contrary to the Covenant. Firstly, where homosexuality is punishable by the death penalty or corporal punishment, by their incompatibility with Articles 6 and 7 of the Covenant, and in all other cases because they are contrary to the recognition of gender identity and sexual tendencies, which constitutes discrimination contrary to Articles 2 and 26.

In its concluding observations on the fifth periodic report of Iraq, adopted on 4 November 2015, the Committee raises in interesting terms the issue of sexual trends and gender identity, in the context of the relationship between the universality of human rights and cultural and religious particularisms and identities. It states the following:

> The Committee is concerned at allegations of acts of discrimination and violence against persons on the basis of their real or perceived sexual orientation or gender identity, as well as the social stigmatization and social exclusion […] While the Committee observes the diversity of morality and cultures internationally, it recalls that they must always be subject to the principles of universality of human rights and non-discrimination.

The State party is therefore invited to combat stereotypes and negative attitudes towards certain persons, based on their sexual orientation or gender identity; to take steps to ensure that such persons can fully enjoy all the rights set forth in the Covenant, including the right to peaceful assembly; to take vigorous measures to prevent acts of discrimination and violence; and to consider adopting comprehensive anti-discrimination legislation, including on the grounds of sexual orientation and gender identity.

Examining the third periodic report of Iran, the Committee states in paragraph 10 of its concluding observations adopted on 2 November 2011:

> The Committee is concerned that members of the lesbian, gay, bisexual, and transgender community face harassment, persecution, cruel punishment and the death penalty. It is also concerned that these persons face discrimination on the basis of their sexual orientation, including with respect to access to employment, housing, education and health care, as well as social exclusion in the community.

As this is contrary to both Articles 2 and 26, and therefore falls within the scope of the rights guaranteed by the Covenant, the Committee recommends that the State party repeal or amend laws that may result in such discrimination against persons on the basis of their sexual orientation or gender identity. It also recommends the "immediate and unconditional release" of anyone in detention solely on the basis of free and mutually consensual sexual relations. Similarly, the State is called upon to take all measures to protect such persons from violence and social exclusion. The same positions were echoed in the concluding observations on Yemen of March 2012, and on Morocco's sixth periodic report. In the latter case, the Committee states in §§ 11 and 12 of its concluding observations adopted on 2 November 2016:

> The Committee is concerned at the criminalization of homosexuality, the fact that it is punishable by a term of imprisonment of up to 3 years and the arrests that have been made on that basis. It is also concerned by reports of the advocacy of hatred, discrimination and violence against people because of their sexual orientation or gender identity.

This being contrary to Articles 2, 9 and 26 of the Covenant, the State party is therefore invited to repeal Article 489 of the Criminal Code in order to decriminalize homosexuality and sexual relations between consenting adults of the same sex; to release anyone in detention solely on the basis of free and mutually consensual sexual relations; and "put an end to the social stigmatization of homosexuality, incitement to hate, discrimination and violence directed at persons because of their sexual orientation or actual or presumed gender identity".

M. *Expulsion of homosexuals to a Muslim state that criminalises homosexuality*

The deportation of an irregular transgender asylum-seeker to a Muslim State that criminally sanctions such behaviour may result in a violation of several provisions of the Covenant, such as Articles 7, 17, 18 and

26. For example, in the case of M. Z. B. M v. Denmark (Communication 2593/2015 of 20 March 2017),[37] the author of the communication is an asylum seeker. She is a Malaysian national who underwent a sexual reassignment surgery in Thailand in 2007. She is being deported to Malaysia by Denmark. She claims that her removal to Malaysia would violate her rights under Article 7, read in conjunction with Article 17 (1), Article 18 (1) and Article 26 of the Covenant. She claims that her forcible removal to Malaysia would constitute a violation of Article 7 of the Covenant in that she would be at risk of sexual violence by the Malaysian police. She argues that as a transgender woman, she belongs to an extremely vulnerable minority group. The seriousness of the risk she faces is due to her gender identity and appearance, which are not in accordance with Sharia rules and for which she has been subjected to sexual violence and discrimination by the Malaysian authorities in the past.[38] She also argues that her conversion to Hinduism, which amounts to apostasy under Sharia law, would expose her to imprisonment if returned to Malaysia. She adds that, in the proceedings pending against her before the Islamic Court in Malaysia, "her gender identity is being made public, in violation of her right to privacy" and that, in view of her national identity documents, according to which she is male, if sentenced to prison, she would be detained together with men, which would expose her to further abuse. All this constitutes a violation of Article 7, read in conjunction with Article 17 (1), and Article 26.

Responding to the State party's contention that Articles 17 and 26 could not be applied extraterritorially, contrary to Articles 6 and 7 of the Covenant, the Committee notes that these claims were essentially based on Article 7 and "that the risk to her rights under articles 17 and 26 underscore the increased risk that she would be subjected to cruel, inhuman or degrading treatment or punishment if she were returned to Malaysia". The Committee concludes that these claims are therefore admissible and require consideration on the merits, in the same way as Article 7.

On the latter point, the Committee rejects the State's argument that the claim under Article 7 is insufficiently substantiated. It notes, however, that:

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[37] CCPR/C/119/D/2593/2015.

[38] The Federal Court of Malaysia decided in October 2016 to overturn a lower court decision that had declared a Shariah provision in Negeri Sembilan State that criminalized cross-dressing to be unconstitutional.

> […] as a transgender individual the author is part of a particularly vulnerable group in Malaysia, that she claims to have been repeatedly detained and subjected to sexual abuse as a result of her appearance and gender identity, which do not correspond with her identity document and are contrary to sharia law, and that she has argued that her return to Malaysia would expose her to a risk of further police harassment and abuse.

The Committee concludes that the author has sufficiently substantiated her claims under Article 7, read in conjunction with Articles 17 (1), and 26 of the Covenant. Accordingly, the Committee considers that the author has sufficiently substantiated her claims under Article 7, read in conjunction with Article 17 (1), and Article 26 of the Covenant and declares them admissible.

In paragraph 7.2 of its Views, the Committee states that:

> She alleges that her appearance makes it likely that she will be subjected to continued checks if she is returned to Malaysia given her past experience and the general context of criminalization and persecution of transgender women, as confirmed by international reports submitted by the author, and that her tattoos increase the risk that she will be transferred to the sharia court. She states that, in the context of the case pending against her before the sharia court in Melaka, her gender identity is being made public, in violation of her right to privacy. She further states that, based on her national identity documents, if imprisoned, she would be held together with men, thereby exposing her to further abuse.

Consequently, as a matter of principle, the Committee would have accepted the violations raised by the author of the communication on the merits. If it did not do so, it did not do so at the level of principle, but because of the lack of evidence and the inconsistency of the author's assertions before the Refugee Appeals Board, which found:

> […] the allegations of detention and, in particular, sexual abuse to be poorly substantiated and inconsistent on several grounds, including the number, time and location of the alleged incidents and the number of perpetrators. In this regard, the Committee notes that the author described those incidents in a generic manner in her communication. Regarding the alleged criminal proceedings against the author under sharia law and the threats of imprisonment made in 2012 as a result, the Board also reviewed the sharia court documents presented by the author but noted that the charges against her had not been pursued since April 2012 and that, between that date and her final departure in January 2014, the author had frequently travelled abroad without ever experiencing any difficulties, and

> that she had not been detained or otherwise harassed during that time. In the light of these trips abroad, the Board also questioned the author's claim that the reason for delaying her departure until January 2014 was her lack of financial means.

It is for this reason, and for this reason alone, that the Committee rejected on the merits the author's claim that her return to Malaysia would constitute a violation of her rights under Article 7, read in conjunction with Articles 17 (1), and 26 of the Covenant.

On the other hand, in other cases, the Committee may find a violation of the Covenant if it is proved that the deportation of a homosexual person to a Muslim State would expose him or her to a risk to life or torture. In the case of X. v. Sweden (communication 1833/2008, subject of Views adopted on 1 November 2011),[39] the Committee found that the deportation by Sweden of an asylum seeker to Afghanistan constituted a violation of Articles 6 and 7 of the Covenant. Taking into account the author's argument that "his forcible return to Afghanistan would expose him to a risk of torture and other cruel, inhuman or degrading treatment or punishment, as well as threats to his life due to his sexual orientation" and while recognising that the assessment of facts and evidence to establish the existence of a danger that could threaten the asylum-seeker fell within the sole competence of the State, the Committee notes that the Swedish authorities rejected the application not on the basis of the author's uncontested sexual orientation, but, on the one hand, because this claim was invoked only at a late stage of the asylum procedure, which weakened its credibility, and, on the other hand, because of the inconsistencies in the author's account of the facts presented by him. Not being convinced by the State's contention, and considering the real danger faced by the asylum-seeker, the Committee considered that "insufficient weight was given to the author's allegations on the real risk he might face in Afghanistan in view of his sexual orientation". Therefore, the deportation of the author to Afghanistan constitutes a violation of Articles 6 and 7 of the Covenant.

In M.I. v. Sweden, Communication 2149/2012, Views adopted on 25 July 2013,[40] the case concerned the deportation of a lesbian woman asylum seeker to Bangladesh. In her communication, the author stated that her deportation from Sweden to Bangladesh would constitute a vio-

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[39] CCPR/C/103/D/1833/2008.
[40] CCPR/C/108/D/2149/2012.

lation of Article 7 of the Covenant. As a lesbian, the author was disowned by her family who forced her to marry a Bengali man living in Sweden. In June 2006, she arrived in Sweden to join her husband. But when her husband found out that she was a lesbian he forcibly returned her to Bangladesh in July 2006. When she returned to her country, her relationship with her partner was discovered. She and her partner were then threatened by radical Islamist organisations, arrested by the police, detained for a few days, tortured and raped while in detention. Returning to Sweden in 2008, covered by her still-valid temporary residence permit, she applied for asylum to the Swedish authorities and submitted a medical certificate stating that she was suffering from a nervous breakdown. The author claims that her deportation to Bangladesh would expose her not only to criminal sanctions, despite the fact that the law was not strictly enforced, but above all to stereotyping and violence by society as a whole against sexual minorities of any kind. The Migration Board rejected her application on the grounds of lack of evidence, weaknesses and contradictions of factual arguments and thus lack of credibility, since she had been able to return to and leave Bangladesh without difficulty and she was not at risk of being subjected to torture if returned to her country. The State party submits that: "Although there may be concerns with respect to the current human rights situation in Bangladesh as regards LGBT individuals, this does not in itself suffice to establish that the forced return of the author would constitute a breach of the State party's obligation under article 7 of the Covenant".

The author's appeals before the Swedish courts were dismissed for the same reasons as those invoked by the State. A new asylum application was also rejected in 2012 by the Migration Board. Having found the communication admissible, the Committee examines it on the merits, and its assessment leads it to paragraph 7.5 of its Views, in which the Committee states:

> In the present communication, the Committee observes, based on the material before it, that the author's sexual orientation and her allegations of rape by Bangladeshi policemen while in detention was not challenged by the State party. It also observes that her sexual orientation was in the public domain and was well known to the authorities; that she suffers from severe depression with high risk of committing suicide despite medical treatment received in the State party; that section 377 of the Criminal Code of Bangladesh forbids homosexual acts; and that homosexuals are stigmatized in Bangladesh society. The Committee considers that the existence of

> such a law in itself fosters the stigmatization of LGTB individuals and constitutes an obstacle to the investigation and sanction of acts of persecution against these persons. The Committee considers that in deciding her asylum request the State party's authorities focused mainly on inconsistencies and ambiguities in the author's account of specific supporting facts. However, the inconsistencies and ambiguities mentioned are not of a nature as to undermine the reality of the feared risks. Against the background of the situation faced by persons belonging to sexual minorities, as reflected in reports provided by the parties, the Committee is of the view that, in the particular case of the author, the State party failed to take into due consideration the author's allegations regarding the events she experienced in Bangladesh because of her sexual orientation – in particular her mistreatment by the police – in assessing the alleged risk she would face if returned to her country of origin. Accordingly, in such circumstances, the Committee considers that the author's deportation to Bangladesh would constitute a violation of article 7 of the Covenant.

N. *Education and school curricula*

The right to education is both a right of the child and his or her family. From this perspective, parents have the right to choose an education for their children that is appropriate to their own religious beliefs. This shows that the right to education is closely linked to the right to freedom of religion. This principle has been recognised by the Toledo Guidelines on Teaching about Religions and Beliefs in Public Schools.[41] In paragraph 26 of its concluding observations on the initial report of Indonesia, the Committee raised the issue of freedom of religion in teaching and education in a new and rather novel way in the Committee's positions. While acknowledging the efforts made by the State party to reform school curricula to provide students of various religious backgrounds with the opportunity to study the religion whose precepts they follow, the Committee:

> […] further notes that religion is taught at schools as a compulsory subject and that the State party intends to only partly extend the list of religions to be taught. However, it does not intend to provide students with a choice among religions in which to be instructed, and it does not intend to provide a possibility to avoid religious education altogether.

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[41] OSCE, Toledo Guiding Principles on Teaching about Religions and Beliefs in Public School.

This is not in line with Articles 2 and 18 of the Covenant. The Committee then recalls the principle that the right to freedom of thought, conscience and religion implies not only the freedom to adopt and follow particular religions or beliefs, but also the right to refuse them. Referring to general comment No. 22, the Committee affirms that: "public education that includes instruction in a particular religion or belief is inconsistent with article 18 (4) unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians". The Committee therefore recommends that the State party: "reform the education curricula to promote religious diversity as well as to ensure that the preferences of believers and of non-believers are both accommodated".

In its concluding observations on the fourth periodic report of Cyprus of 31 March 2015:[42] "While noting that students or parents have the right to apply for an exemption from attending religious teachings other than that of their own religion, the Committee remains concerned that in some cases, students are required to remain in class, despite being granted an exemption". In its recommendation, the Committee requests the State party:

> […] ensure that every student has the freedom to participate or not to participate in religious education in school, that exemptions are easily available and not subject to burdensome administrative procedures, and that students of different religious convictions, particularly Muslims in the southern part of the island and other non-orthodox communities, have access to alternative religious education on a voluntary basis.

[42] CCPR/C/CYP/CO/4.

CONCLUSION

We can clearly see from the exposition of the jurisprudence and positions of the Human Rights Committee that the latter can be proud to have produced a rich and nuanced work in the field of the defence and promotion of human rights in Islamic countries. The strong point of its jurisprudence is that it has been able to strike a fair balance between the need to protect Islam as a religion and community, particularly in countries where Islam is a minority, and the need to control and punish Islamic behaviour or legislation that violates the rights and freedoms enshrined in the Covenant. From this point of view, the work of the Committee is a real work of craftsmanship, and no one can accuse the Committee of having deviated from this essential task of equity, that is to say, this fair distribution between the rights and duties of each religion, whether represented by societies, communities, States, positive laws or sacred laws.

The Achilles' heel of his work is that, in the name of the universalism of human rights, it adopts positions that are sometimes out of step with the political and social reality of Islamic states. This obviously and inevitably leads to a difficulty first of all in understanding and then implementing the Committee's decisions. This obliges the Committee to constantly reiterate the same principles in its successive concluding observations for the same State. Islamic States remain strongly attached to a quasi-genetic conception of religion, which is certainly open to criticism at the philosophical level and even at the level of Islamic theology itself, but which nevertheless remains strongly rooted in social practice and mass ideas. I do not in any way dispute the universality of human rights, but I believe that it is based on a questionable presupposition, namely the non-existence of a hierarchy between rights and freedoms. This hierarchy, which can be legitimately defended on a philosophical level, nevertheless exists both in terms of the historical anthropology of human rights and in terms of the legal method of elaborating these rights. At the latter level, as a number of delegations participating in the dialogue with the Committee remind us, a number of rights and freedoms are expressly enshrined in the Covenant and truly represent universal rights. Others, on the other hand, are the result of the Committee's extensive interpretation of the

provisions of the Covenant. The latter do not always reflect indisputable universality, but sometimes express a particular conception of the Western philosophy of morals, rights and freedoms. However, as Sébastien Touzé points out: "To base and conceive human rights on a call for a modelling based on a Western philosophical and political conception without taking into consideration the plurality of societies within which they are required to fulfil an essential function is to discredit the values they intend to convey".[1] To put it another way, promoting human rights means first of all making them understood and justified from an irrefutable scientific point of view, which is the case for questions of sexual tendencies and gender identity. Here, science is the true legacy currently in our hands. We have no other. On these sensitive issues, the law must take a back seat to science. The promotion of human rights is therefore, in the first place, a work of pedagogy. Pedagogy consists, in part, in bringing the pedagogue up to the level of his/her interlocutor, while raising his/her level of understanding towards that of the pedagogue. It is true that it is exceedingly difficult to maintain a perfect balance between the imperatives of universality and the demands of culturalism,[2] between idealism and realism[3]. However, the Committee cannot escape this if it wants its voice to be heard by the maximum number of States. The Committee, it seems to me, should reflect on this question of universality "*read in conjunction*" with the two questions of the social specificities of each nation and the hierarchy of fundamental human rights and freedoms. This is all the more necessary, since in most cases the difficulties relate to language.[4]

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[1] Sébastien Touzé: "Les pays arabes ou musulmans et les traités universels de protection des droits de l'homme [Arab or Muslim Countries and Universal Treaties to Protect Human Rights]", in Afoukh (dir.), *L'islam en droit international des droits de l'homme*, op. cit., p. 104. See also, Édouard Dubout and Sébastien Touzé, "Refonder les droits de l'Homme. Des critiques aux pratiques [Re-Establishing Human Rights. From Critiques to Practices]", Pedone, 2019.

[2] Pierre Arsac, Jean-Luc Chabot and Henri Pallard, *Etat de droit, droits fondamentaux et diversité culturelle [Rule of Law, Fundamental Rights and Cultural Diversity]*, L'Harmattan, 1999. Henri Pallard and Stamatios Tzitis, *Droits fondamentaux et spécificités culturelles [Fundamental Rights and Cultural Specificities]*, texts collected and presented by Henri Pallard and Stamatios Tzitis, L'Harmattan, 1997.

[3] Christian Tomuschat, *Human rights between idealism and realism*, second edition, Oxford university Press, 2008.

[4] As a simple example, the phrase "persons because of their sexual orientation or gender identity" seems more compelling, and therefore more accepted, than the phrase "lesbian, gay, bisexual, transgender and intersex". More specifically, it emphasises that the issue is a biological, psychological, and scientific one and is not an arbitrary choice derived from a morality specific to European civilisation. Its use can be an argument to invite delegations to at least reflect on the issue instead of dismissing it out of hand.

APPENDICES

1. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (EXCERPTS. PARTS I TO III)

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966

Entry into force: 23 March 1976, in accordance with the provisions of Article 49

Preamble

The States Parties to the present Covenant

Considering that, in accordance with the principles enshrined in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognising that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedoms and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy civil and political rights, as well as economic, social and cultural rights

Considering that the Charter of the United Nations imposes on States the obligation to promote universal respect for and observance of human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

Part I

Article 1

1. All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination of peoples, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Part II

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, 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.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authori-

ties, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 8

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3.

(a) No one shall be required to perform forced or compulsory labour;

(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

(i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(iv) Any work or service which forms part of normal civil obligations.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. 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 and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2.

(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to

have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20

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.

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

2. OBJECTIONS TO RESERVATIONS

German Federal Republic

The FRG, addressed the following objection on 15 Nov. 2005, with *regard to reservations made by Mauritania upon ratification*:

"The Government of the Federal Republic of Germany has carefully examined the declaration made by the Government of Mauritania on 17 November 2004 in respect of Articles 18 and 23 (4) of the International Covenant on Civil and Political Rights.

The Government of the Federal Republic of Germany is of the opinion that the limitations set out therein leave it unclear to which extent Mauritania considers itself bound by the obligations resulting from the Covenant.

The Government of the Federal Republic of Germany therefore regards the above-mentioned declaration as a reservation and as incompatible with the object and purpose of the Covenant.

The Government of the Federal Republic of Germany therefore objects to the above-mentioned reservation made by the Government of Mauritania to the International Covenant on Civil and Political Rights. This objection shall not preclude the entry into force of the Covenant between the Federal Republic of Germany and Mauritania".

On 28 June 2011, the Government of the Federal Republic of Germany lodged the following objections to the reservations made by Pakistan (23 June 2010) to Articles 3, 6, 7, 12, 13, 18, 19 and 25 of the International Covenant on Civil and Political Rights.

"The Government of the Federal Republic of Germany is of the opinion that these reservations subject the applications of Articles 3, 6, 7, 12, 13, 18, 19 and 25 of the Covenant to a system of domestic norms without specifying the contents thereof, leaving it uncertain to which extent the Islamic Republic of Pakistan accepts to be bound by the obligations under the Covenant and raising serious doubts as to its commitment to fulfil its obligations under the Covenant. These reservations therefore are considered incompatible with the

object and purpose of the Covenant and consequently impermissible under Art. 19 c of the Vienna Convention on the Law of Treaties".

On 25 January 2019, the Government of the Federal Republic of Germany made the following objections to the reservations made by *Qatar upon accession*:

"The reservations to Article 3 and to Article 23.4 as well as statements 1 to 4 make the application of specific provisions of the Covenant subject to the Islamic Sharia or national legislation. Statements 1 to 4 are thus of their nature also reservations.

The Government of the Federal Republic of Germany is of the opinion that by making the application of Articles 3, 7, 18.2, 22, 23.2 and 23.4 of the Covenant subject to the Islamic Sharia or national law, the State of Qatar has submitted reservations which raise doubts concerning the extent to which it intends to fulfil its obligations under the Covenant.

The above-mentioned reservations are incompatible with the object and purpose of the Covenant and are accordingly not permitted under Article 19 sub-paragraph (c) of the Vienna Convention on the Law of Treaties of 23 May 1969. The Federal Republic of Germany thus objects to these reservations".

Austria

On 24 June 2011, Austria lodged an objection with regard to Pakistan. In its objection it stated:

The Government of Austria considers that in aiming to exclude the application of those provisions of the Covenant which are deemed incompatible with the Constitution of Pakistan, Sharia laws and certain national laws, the Islamic Republic of Pakistan has made reservations of general and indeterminate scope. These reservations do not clearly define for the other States Parties to the Covenant the extent to which the reserving State has accepted the obligations of the Covenant.

The Government of Austria therefore considers the reservations of the Islamic Republic of Pakistan to Articles 3, 6, 7, 18 and 19; further to Articles 12, 13 and 25 incompatible with the object and purpose of the Covenant and objects to them.

On 16 May 2019, Austria objected to the reservations and declarations made by Qatar upon accession which they considered as amounting to:

"…reservations as they aim at applying provisions of the Covenant only in conformity with national legislation or the Islamic sharia. However, the Covenant is to be applied in accordance with international law, not only in accordance with the legislation of a particular state.

By referring to its national legislation or to the Islamic sharia, Qatar's reservations to Articles 7, 18.2, 22, 23.2 and 23.4 of the Covenant are of a gen-

eral and indeterminate scope. These reservations do not clearly define for the other States Parties the extent to which the reserving state has accepted the obligations of the Covenant. Furthermore, the reservation to Article 23.4 contravenes Article 3 of the Covenant, one of its most central provisions.

Austria therefore considers the reservations to be incompatible with the object and purpose of the Covenant and objects to them".

Similar objections were made by Belgium to Pakistan on 28 June 2011 because:

The vagueness and general nature of the reservations made by Pakistan with respect to Articles 3, 6, 7, 12, 13, 18, 19 and 25 of the International Covenant on Civil and Political Rights may contribute to undermining the bases of international human rights treaties.

The reservations make the implementation of the Covenant's provisions contingent upon their compatibility with the Islamic Sharia and/or legislation in force in Pakistan. This creates uncertainty as to which of its obligations under the Covenant Pakistan intends to observe and raises doubts as to Pakistan's respect for the object and purpose of the Covenant". (objection also with regard to Qatar).

United States

On 29 June 2011, the United States objected to the reservations of Mauritania and Pakistan in the following terms:

"The Government of the United States of America objects to Pakistan's reservations to the ICCPR. Pakistan has reserved to Articles 3, 6, 7, 12, 13, 18, 19, and 25 of the Covenant, which address the equal right of men and women to the full enjoyment of civil and political rights, the right to life, protections from torture and other cruel inhuman or degrading treatment or punishment, freedom of movement, expulsion of aliens, the freedoms of thought, conscious and religion, the freedom of expression, and the right to take part in political affairs. Pakistan has also reserved to Article 40, which provides for a process whereby States Parties submit periodic reports on their implementation of the Covenant when so requested by the Human Rights Committee (HRC). These reservations raise serious concerns because they both obscure the extent to which Pakistan intends to modify its substantive obligations under the Covenant and also foreclose the ability of other Parties to evaluate Pakistan's implementation through periodic reporting. As a result, the United States considers the totality of Pakistan's reservations to be incompatible with the object and purpose of the Covenant. This objection does not constitute an obstacle to the entry into force of the Covenant between the United States and Pakistan, and the aforementioned articles shall apply between our two states, except to the extent of Pakistan's reservations".

France

On 18 November 2005, France objected to the reservations made by Mauritania upon accession:

"The Government of the French Republic has examined the declarations formulated by the Government of Mauritania upon acceding to the International Covenant on Civil and Political Rights, adopted on 16 December 1966, in accordance with which the Government of Mauritania, on the one hand, 'while accepting the provisions set out in article 18 concerning freedom of thought, conscience and religion, declares that their application shall be without prejudice to the Islamic sharia' and, on the other, 'interprets the provisions of article 23, paragraph 4, on the rights and responsibilities of spouses as to marriage as not affecting in any way the prescriptions of the Islamic sharia'. By making the application of article 18 and the interpretation of article 23, paragraph 4, of the Covenant subject to the prescriptions of the Islamic sharia, the Government of Mauritania is, in reality, formulating reservations with a general, indeterminate scope, such that they make it impossible to identify the modifications to obligations under the Covenant, which they purport to introduce. The Government of the French Republic considers that the reservations thus formulated are likely to deprive the provisions of the Covenant of any effect and are contrary to the object and purpose thereof. It therefore enters an objection to these reservations".

Australia

On 28 June 2011, the Australian Government objected to Pakistan's reservations that seek to make the application of the Covenant subject to the provisions of its general domestic law in force. In its objection Australia states:

"As a result, it is unclear to what extent The Islamic Republic of Pakistan considers itself bound by the obligations of the Covenant and therefore raises concerns as to the commitment of The Islamic Republic of Pakistan to the object and purpose of the Covenant.

The Government of Australia considers that the reservations to the Covenant are subject to the general principle of treaty interpretation, pursuant to Article 27 of the Vienna Convention of the Law of Treaties, according to which a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

Further, the Government of Australia recalls that according to article 4 (2) of the Covenant, no derogation of article 18 is permitted".

Poland

On 20 June 2011, with regard to the *reservations made by Pakistan upon ratification*:

"The Government of the Republic of Poland has examined the reservations made by the Islamic Republic of Pakistan upon accession to the International Covenant on Civil and Political Rights, opened for signature at New York on 19 December 1966, with regard to Articles 3, 6, 7, 12, 13, 18, 19, 25 and 40 of the Covenant.

In the view of the Government of the Republic of Poland, if put into practice, the reservations made by the Islamic Republic of Pakistan, especially when taking into account their unspecified extent and the vast area of rights they affect, will considerably limit the ability to benefit from the rights guaranteed by the Covenant.

Consequently, the Government of the Republic of Poland considers these reservations as incompatible with the object and purpose of the Covenant, which is to guarantee equal rights to everyone without any discrimination. In consequence, according to Article 19 (c) of the Vienna Convention on the Law of Treaties, which is a treaty and customary norm, these reservations shall not be permitted.

In order to justify its will to exclude the legal consequences of certain provisions of the Covenant, the Islamic Republic of Pakistan raised in its reservations the inconsistency of these provisions with its domestic legislation. The Government of the Republic of Poland recalls that, according to Article 27 of the Vienna Convention on the Law of Treaties, the State Party to an international agreement may not invoke the provisions of its internal law as justification for its failure to perform a treaty. On the contrary, it should be deemed a rule that a State Party adjusts its internal law to the treaty which it decides to be bound by. On these grounds, the reservations made by the Islamic Republic of Pakistan with regard to Articles 3, 6, 7, 12, 13, 18, 19 and 25 of the Covenant shall not be permitted.

The Islamic Republic of Pakistan refers in its reservations to the Sharia laws and to its domestic legislation as possibly affecting the application of the Covenant. Nonetheless it does not specify the exact content of these laws and legislation. As a result, it is impossible to clearly define the extent to which the reserving State has accepted the obligations of the Covenant. Thus, the reservations made by the Islamic Republic of Pakistan with regard to Articles 3, 6, 7, 12, 13, 18, 19 and 25 of the Covenant shall not be permitted.

Furthermore, the Government of the Republic of Poland considers that reservations aimed at limitation or exclusion of the application of treaty norms stipulating non-derogable rights are in opposition with the purpose of this treaty. On these grounds, the reservations made with regard to Articles 6 and 7 of the Covenant are impermissible.

The Government of the Republic of Poland objects also to the reservation made by the Islamic Republic of Pakistan with regard to Article 40 of the Covenant considering it as impermissible as it undermines the basis of the United Nations mechanism of monitoring of the respect of human rights. The

Government of the Republic of Poland considers the reporting obligations of States Parties to the Covenant to be of utmost importance for the effectiveness of the UN system of the protection of human rights and as such – not of optional nature.

Therefore, the Government of the Republic of Poland objects to the reservations made by the Islamic Republic of Pakistan upon accession to the International Covenant on Civil and Political Rights opened for signature at New York on 19 December 1966, with regard to Articles 3, 6, 7, 12, 13, 18, 19, 25 and 40 of the Covenant.

This objection does not preclude the entry into force of the Covenant between the Republic of Poland and the Islamic Republic of Pakistan".

Switzerland

On 28 June 2011, with regard to the *reservations made by Pakistan upon ratification*:

Concerning the International Covenant on Civil and Political Rights of 16 December 1966:

"The Swiss Federal Council has examined the reservations made by the Islamic Republic of Pakistan upon its accession to the International Covenant on Civil and Political Rights of 16 December 1966, with regard to articles 3, 6, 7, 18 and 19 of the Covenant.

The reservations to the articles, which refer to the provisions of domestic law and Islamic Sharia law, do not specify their scope and raise doubts about the ability of the Islamic Republic of Pakistan to honour its obligations as a party to the Covenant. Furthermore, the Swiss Federal Council emphasizes that the third sentence of article 6, paragraph 1; article 7; and article 18, paragraph 2, constitute jus cogens and therefore enjoy absolute protection.

A general reservation to article 40, a key provision of the Covenant, raises serious doubts as to the compatibility of such a reservation with the object and purpose of the Covenant.

Article 19 of the Vienna Convention on the Law of Treaties of 23 May 1969 prohibits any reservation that is incompatible with the object and purpose of a treaty.

Consequently, the Swiss Federal Council objects to the aforesaid reservations made by the Islamic Republic of Pakistan to the International Covenant on Civil and Political Rights of 16 December 1966.

This objection does not preclude the entry into force of the Covenant between Switzerland and the Islamic Republic of Pakistan".

On 17 May 2019, with regard to the *reservations and declarations made by Qatar upon accession*:

The Swiss Federal Council has examined the reservations and declarations

made by the State of Qatar upon accession to the International Covenant on Civil and Political Rights of 16 December 1966.

The Swiss Federal Council considers that the declarations concerning articles 7, 18 (2), 22 and 23 (2) of the Covenant amount in fact to reservations. Reservations subjecting all or part of articles 3, 7, 18 (2), 22 and 23 (2) and (4) of the Covenant in general terms to Sharia law and/or national legislation constitute reservations of general scope which raise doubts about the full commitment of the State of Qatar to the object and purpose of the Covenant. The Swiss Federal Council recalls that, according to sub-paragraph (c) of article 19 of the Vienna Convention of 23 May 1969 on the law of treaties, reservations incompatible with the object and purpose of the Covenant are not permitted.

It is in the common interest of States that instruments to which they have chosen to become parties be respected in their object and purpose by all parties and that States be prepared to amend their legislation in order to fulfil their treaty obligations.

Henceforth, the Swiss Federal Council objects to these reservations by the State of Qatar. This objection shall not preclude the entry into force of the Covenant, in its entirety, between Switzerland and the State of Qatar".

United Kingdom

17 August 2005, with regard to the *declarations made by Mauritania upon accession*:

"The Government of the United Kingdom have examined the Declaration made by the Government of Mauritania to the International Covenant on Civil and Political Rights (done at New York on 16 December 1966) on 17 November 2004 in respect of Articles 18 and 23 (4).

The Government of the United Kingdom consider that the Government of Mauritania's declaration that:

'The Mauritanian Government, while accepting the provisions set out in article 18 concerning freedom of thought, conscience and religion, declares that their application shall be without prejudice to the Islamic Shariah. …

The Mauritanian Government interprets the provisions of article 23, paragraph 4, on the rights and responsibilities of spouses as to marriage as not affecting in any way the prescriptions of the Islamic Shariah is a reservation which seeks to limit the scope of the Covenant on a unilateral basis. The Government of the United Kingdom note that the Mauritanian reservation specifies particular provisions of the Convention Articles to which the reservation is addressed. Nevertheless, this reservation does not clearly define for the other States Parties to the Convention the extent to which the reserving State has accepted the obligations of the Convention. The Government of the United Kingdom therefore object to the aforesaid reservation made by the Government of Mauritania.

This objection shall not preclude the entry into force of the Convention between the United Kingdom of Great Britain and Northern Ireland and Mauritania".

6 September 2007, with *regard to the reservation made by Maldives upon accession*:

"The application of the principles set out in Article 18 [freedom of thought, conscience and religion] of the Covenant shall be without prejudice to the Constitution of the Republic of the Maldives'.

In the view of the United Kingdom a reservation should clearly define for the other States Parties to the Covenant the extent to which the reserving State has accepted the obligations of the Covenant. A reservation which consists of a general reference to a constitutional provision without specifying its implications does not do so. The Government of the United Kingdom therefore object to the reservation made by the Government of the Maldives.

This objection shall not preclude the entry into force of the Covenant between the United Kingdom and the Maldives".

On 28 June 2011, with regard to the *reservations made by Pakistan upon ratification*:

"The Government of the United Kingdom of Great Britain and Northern Ireland has examined the reservations made by the Government of Pakistan to the [International] Covenant [on Civil and Political Rights] on 23 June 2010, which read:

> 1. [The] Islamic Republic of Pakistan declares that the provisions of Articles 3, 6, 7, 18 and 19 shall be so applied to the extent that they are not repugnant to the Provisions of the Constitution of Pakistan and the Sharia laws.
> 2. The Islamic Republic of Pakistan declares that the provisions of Articles 12 shall be so applied as to be in conformity with the Provisions of the Constitution of Pakistan.
> 3. With respect to Article 13, the Government of the Islamic Republic of Pakistan reserves its right to apply its law relating to foreigners.
> 4. [The] Islamic Republic of Pakistan declares that the provisions of Articles 25 shall be so applied to the extent that they are not repugnant to the Provisions of the Constitution of Pakistan.
> 5. The Government of the Islamic Republic of Pakistan hereby declares that it does not recognize the competence of the Committee provided for in Article 40 of the Covenant.

In the view of the United Kingdom a reservation should clearly define for the other States Parties to the Covenant the extent to which the reserving State has accepted the obligations of the Covenant. Reservations which consist of a general reference to a constitutional provision, law or system of laws without specifying their contents do not do so.

In addition, the United Kingdom considers that the reporting mechanism enshrined in Article 40 is an essential procedural requirement of the Covenant, and an integral undertaking of States Parties to the Covenant.

The Government of the United Kingdom therefore objects to the reservations made by the Government of Pakistan.

The United Kingdom will re-consider its position in light of any modifications or withdrawals of the reservations made by the Government of Pakistan to the Covenant".

21 May 2019, with *regard to the reservations and declarations made by Qatar upon accession*:

"The Government of the United Kingdom of Great Britain and Northern Ireland has examined the declarations made by the Government of the State of Qatar to the International Covenant on Civil and Political Rights ("the Covenant"), done at New York on 16 December 1966, which read:

Declarations

1. The State of Qatar shall interpret the term "punishment" in Article 7 of the Covenant in accordance with the applicable legislation of Qatar and the Islamic Sharia.

2. The State of Qatar shall interpret Article 18, paragraph 2, of the Covenant based on the understanding that it does not contravene the Islamic Sharia.

The State of Qatar reserves the right to implement such paragraph in accordance with such understanding.

3. The State of Qatar shall interpret that the term "trade unions" and all related matters, as mentioned in Article 22 of the Covenant, are in line with the Labour Law and national legislation. The State of Qatar reserves the right to implement such article in accordance with such understanding.

4. The State of Qatar shall interpret Article 23, paragraph 2, of the Covenant in a manner that does not contravene the Islamic Sharia. The State of Qatar reserves the right to implement such paragraph in accordance with such understanding.

5. The State of Qatar shall interpret Article 27 of the Covenant that professing and practicing one's own religion require that they do not violate the rules of public order and public morals, the protection of public safety and public health, or the rights of and basic freedoms of others.

The Government of the United Kingdom considers that the Government of the State of Qatar's declarations in respect of Article 7; Article 18, paragraph 2; Article 22; Article 23 and Article 27 are reservations which seek to limit the scope of the Covenant on a unilateral basis. The Government of the United Kingdom notes that a reservation to a convention which consists of a general reference to national law or a system of law without specifying its contents does

not clearly define for the other States Parties to a convention the extent to which the reserving State has accepted the obligations of the convention. The Government of the United Kingdom therefore objects to the aforesaid reservations.

These objections shall not preclude the entry into force of the Covenant between the United Kingdom of Great Britain and Northern Ireland and the State of Qatar".

3. CASES SONYA YAKER AND MIRIANNA HEBBADJ, SEPARATE OPINION OF COMMITTEE MEMBER YADH BEN ACHOUR (DISSENTING)

1. In both cases set out in communications Nos. 2747/2016 and 2807/2016 the Committee notes that the State party, by adopting Act No. 2010-1192 of 11 October 2010, prohibiting the concealment of the face in public, has violated the rights of the authors under articles 18 and 26 of the Covenant. I regret that I am unable to share this opinion for the following reasons.

2. Firstly, I am surprised at the Committee's statement that "the State party has not demonstrated how wearing the full-face veil in itself poses a threat to public safety or public order that would justify such an absolute ban". I shall not dwell on the threat to public safety, which appears self-evident given the ongoing battle against terrorists, some of whom have carried out attacks and assassinations in France and elsewhere disguised with niqabs. Security considerations alone justify both prohibition and criminalization. I shall however spend more time on the meaning of the phrase "protect order" read conjointly with "protect the morals or the fundamental rights and freedoms of others" in article 18 (3) of the Covenant.

3. In that article, the term "order" clearly refers to that of the State at the origin of the restriction. In France, under its Constitution, the order is republican, secular and democratic. Equality between men and women is among the most fundamental principles of that order, just as it is among the most fundamental principles of the Covenant. The niqab in itself is a symbol of the stigmatization and degrading of women and as such contrary to the republican order and gender equality in the State party, but also to articles 3 and 26 of the Covenant. Defenders of the niqab reduce women to their primary biological status as females, as sexual objects, flesh without mind or reason, potentially to blame for cosmic and moral disorder, and in consequence obliged to remove themselves from the male gaze and thus be virtually banished from the public space. A democratic State cannot allow such stigmatization, which sets them apart from all other women. Wearing the niqab violates the "fundamental rights and freedoms of others", or, more precisely, the rights of other women and of women as such. Its prohibition is therefore not contrary to the Covenant.

4. I agree with the Committee that the restrictions provided for under article 18 (3) must be interpreted strictly. However, "strictly" does not mean that

the restrictions need not respect the other provisions of the Covenant, or the spirit of article 18 itself, as we have explained in the preceding paragraph.

5. The Committee admits in both cases that "wearing the niqab or the burqa amounts to wearing a garment that is customary for a segment of the Muslim faithful and that it is the performance of a rite or practice of a religion". However, the Committee does not explain the mysterious transformation of a custom into a religious obligation as part of worship, within the meaning of article 18 of the Covenant. The truth is that the wearing of the niqab or the burka is a custom followed in certain countries called "Muslim countries" that, under the influence of political Islamism and a growing puritanism, has been artificially linked to certain verses from the Qur'an, in particular to verse 31 of the Surah of Light and verse 59 of the Surah of the Confederates. However, the most knowledgeable authorities on Islam do not recognize concealing the face as a religious obligation. Even allowing, as the Committee wishes to do, that the wearing of the niqab may be interpreted as an expression of freedom of religion, it must not be forgotten that not all interpretations are equal in the eyes of a democratic society that has founded its legal system on human rights and the principles of the Universal Declaration of Human Rights and of the Covenant, and that has enshrined the principle of secularism within its Constitution – all the more so given the particular historical and legal context of France. Certain interpretations simply cannot be tolerated.

6. The same holds true for polygamy, excision, inequality in inheritance, repudiation of a wife, a husband's right to discipline his wife, and levirate or sororate practices. All those constitute, for their practitioners, religious obligations or rites, just as wearing the full-face veil does for followers of that custom. But the Committee has always considered the former practices to be contrary to the provisions of the Covenant and has consistently called on States to abolish them. Surely then it is contradictory to decide in one case that it is the prohibition of one such practice, which undermines equality between citizens and the dignity of women, that contravenes the Covenant, while deciding in another case that it is the practices that contravene article 18?

7. A more serious problem must be raised. It concerns the concept of "living together" championed by France and which led to the adoption of Act No. 2010/1102. I entirely disagree with the Committee that "the concept of 'living together' is presented by the State party in very vague and abstract terms" and that "the State party has not identified any specific fundamental rights or freedoms of others that are affected". On the contrary, the preamble to the Act deals fully with this issue and clearly states that concealment of the face goes against the social contract, basic good manners, and the notions of fraternity and living together. Unfortunately, the Committee fails to note that the fundamental right that is violated in this instance is not that of a few individuals, nor of any particular

group, but the right of society as a whole to recognize its members by their faces, which are also a token of our social and, indeed, our human, nature. Contrary to the Committee's assertions, the concept of living together is neither vague nor abstract, but rather, precise and specific. It is founded on the very simple idea that a democratic society can only function in full view of all. More generally, as I have already suggested, the most basic human communication, preceding language of any other kind, is conveyed by the face. By totally and permanently concealing our faces in public, especially in a democratic context, we renounce our own social nature and sever our links with our peers. To prohibit the wearing of the full-face veil and penalize it with a small fine is therefore neither excessive nor disproportionate. In this connection, there can be no comparison between the hijab and the niqab. The two are essentially different.

8. By considering that "the criminal ban introduced by article 1 of Act No. 2010-1192 disproportionately affects Muslim women who, like the author, choose to wear the full-face veil and introduces a distinction between these women and other persons who may legally cover their face in public that is not necessary and proportionate to a legitimate interest, and is therefore unreasonable", the Committee is simply turning rights upside down. It concludes from this reasoning that article 1 of the Act constitutes a kind of intersectional discrimination based on sex and religion that violates article 26 of the Covenant. Yet there is no doubt that prohibition is necessary, if only because of the threat to security (see para. 2 above); it is also proportionate, as shown by the light penalty: a fine of 150 euros and a course in citizenship, richly deserved given the seriousness of the infringement of equality between citizens and of the dignity of women.

9. Let us now turn to the question of those persons who, unlike women who wear the full-face veil, are authorized by Act No. 2010/1192 to cover their faces. This, according to the Committee's Views, constitutes discrimination under article 26 of the Covenant. These are the persons referred to in article 2.II of the Act, which establishes exceptions to the prohibition. Can these exceptions be placed on an equal footing and compared with the practice of wearing the full-face veil? Is article 2 of Act No. 2010/1192 discriminatory within the meaning of article 26? I do not think so. These exceptions, generally speaking circumstantial and temporary, are for the most part made for recreational, festive, carnival or sporting purposes, or are required for service or security purposes, in particular road safety. They exist in all countries and in no way constitute discriminatory symbols or messages likely to trigger implementation of article 26 of the Covenant, as the full-face veil would.

10. I conclude that the prohibition of the wearing of the full-face veil and its penalization by fine, especially in the French context, is neither contrary to article 18 nor to article 26 of the Covenant.

Principal Publications

1) *L'État nouveau et la philosophie politique et juridique occidentale*, Tunis, C.E.R.P., Bibliothèque de Droit et de Sciences Politiques et Economiques, Tunis, 1980.
2) *Droit administratif*, Tunis, C.N.U.D.S.T., Publications Scientifiques Tunisiennes, Série droit public, n° 1, Tunis, 1980. Deuxième édition: Tunis, C.P.U., Tunis, 2000. 3ème édition, CPU, 2010.
3) *Politique, religion et droit dans le monde arabe*, Tunis, CERES production, 1992. Trad. italienne par Orsetta Giolo, *La tentazine democratica*, Ombre Corte, Verona, 2010.
4) *Normes, foi, et loi,* Tunis, CERES production, 1993.
5) *Contentieux administratif*, Tunis, CERES production, 1995, en langue arabe, 2ème édition: 1998, 3ème édition: 2006.
6) *Souveraineté étatique et protection internationale des minorités*, Cours à l'Académie de droit international, août 1994, *R.C.A.D.I.*, 1994, Martinus Nijhoff Publishers, La Haye, p. 325.
7) *Conscience et droit: l'Esprit civique et les droits modernes*, Beyrouth, Casablanca, Ed. Centre culturel arabe, 1998, en langue arabe.
8) *Le rôle des civilisations dans le système international. Droit et relations internationales*, Bruxelles, Bruylant, 2003.
9) *La Cour européenne des droits de l'Homme et la liberté de religion*, Paris, Pedone, 2005.
10) *Introduction générale au droit*, Tunis, C.P.U., 2005.
11) *Aux Fondements de l'orthodoxie sunnite*, Paris, PUF, 2008. Tunis, CERES éditions, 2009.
12) *La seconde Fatiha*, *L'Islam et la pensée des droits de l'homme*. Paris, PUF, Mai 2011. CERES éditions Tunis, juillet 2011.
13) *Tunisie: une révolution en pays d'islam*, *CERES* éd., Tunis, 2016. Genève Labor et Fides, 2018.
14) *Islam et démocratie, une révolution intérieure*, Gallimard, mars 2021.

PUBBLICAZIONI DEL DIPARTIMENTO DI GIURISPRUDENZA
DELL'UNIVERSITÀ DEGLI STUDI DI FERRARA
E DEL CENTRO STUDI GIURIDICI EUROPEI SULLA GRANDE CRIMINALITÀ

1. Y. B. ACHOUR, *The Islamic Question before the United Nations Human Rights Committee*, 2021.

Finito di stampare
nel maggio 2021
PL Print - Napoli