

The Federalist Society for Law and Public Policy Studies

Presents

Silenced: Are Global Trends to Ban Religious Defamation, Religious Insult, and Islamophobia a New Challenge to First Amendment Freedoms?

November 4, 2011
Washington, D.C.

Remarks of Jacob Mchangama, Director of Legal Affairs for CEPOS

It is an honor and a privilege to be speaking at this event and I am grateful to the Federalist Society for inviting me.

I am also delighted to be speaking at the same conference as Nina Shea and Paul Marshall whose new book *Silenced* I have had the opportunity to review. The book is indispensable to anyone seeking to understand the degree to which the freedoms of conscience, expression, and religion are being violated in Muslim-majority countries, and why this development has serious consequences for these freedoms in international law and in the West.

The book also underscores how crucial it is to resist ongoing attempts to turn Islamic blasphemy laws into international law through human-rights language.

The attempt to prohibit criticism and so-called “defamation” of Islam under human rights law is part of an international campaign that has been waged primarily by the 56 member states of the Saudi-based Organization of Islamic Cooperation (formerly the Organization of the Islamic Conference) (OIC) set up in 1969.

Member states of the OIC include, but are not limited to, Saudi Arabia, Pakistan, Iran, and Egypt, countries that all combine systematic repression of religious minorities at home whilst rigorously campaigning for limiting criticism of Islam abroad. In 1990, the OIC member states adopted their own “Cairo Declaration on Human Rights in Islam,” which seeks to unite Islam and human rights. However, all the rights in the Cairo Declaration are subject to the often illiberal and oppressive rules of Islamic Shari’ah law. Article 21 states that “Everyone shall have the right to express his opinion freely – but then adds – in such manner as would not be contrary to the principles of the Shari’ah.” In a 1995 debate at the U.N., the OIC clarified what subjecting free speech to Shari’ah entails: “[In] the opinion [of] the OIC... the right to freedom of thought, opinion and expression could in no case justify blasphemy.” Moreover, the OIC definition of blasphemy is extremely far reaching as witnessed by the wide spread use of blasphemy laws documented at this conference and in *Silenced*.

It is these kinds of laws that the OIC wants to turn into international human rights norms. The first resolution tabled by Pakistan on behalf of the OIC in 1999 was introduced as “Defamation of Islam,” but, after some debate, the title was changed to “Defamation of religions.” The resolution expresses “deep concern at negative stereotyping of religions” as well as concern

at any role in which the media or any other means is used to incite acts of xenophobia or related intolerance and discrimination towards Islam and any other religion.

Despite the fact that only Islam was explicitly mentioned and that the resolution included wording hostile to free speech, the 1999 as well as the 2000 resolutions on defamation of religions were adopted unanimously without a vote.

The initial acceptance of the concept of defamation of religions by the Western states, including the U.S., in the Commission on Human Rights undoubtedly helped the ever more aggressive agenda of the OIC. Since 2001, the resolutions on defamation became increasingly comprehensive and hostile to freedom of expression and were therefore put to a vote at the Commission on Human Rights, the Human Rights Council, and the General Assembly. The battle over Islam and free speech has also played out during public debates at the U.N. where both Pakistan and Egypt managed to prevent a critical NGO from discussing Shari’ah as it would be “insulting to our faith to discuss shari’ah here in this forum.” However, from peaking in 2003, the resolutions on defamation of religions have steadily lost votes in both the HRC and the GA. In 2003, 32 countries voted in favor, 14 against, and 7 abstained. In 2010, the numbers were 20, 17, and 8, respectively. The dwindling support, as well as the murder of two Pakistani politicians critical of Pakistan’s blasphemy laws, has likely been key to the OIC’s realization that defamation of religions – for now – is a counterproductive agenda to pursue at the U.N..

Thus, earlier this year the OIC chose not to table a resolution against “defamation of religion” at the Human Rights Council, opting instead for a consensus resolution aimed at “Combating intolerance, negative stereotyping and stigmatization of... persons based on religion or belief.” This was celebrated as a major victory for free speech since the resolution omitted any reference to “defamation.” But, while the campaign to prohibit “defamation” may have run out of steam, the campaign to limit criticism of Islam under human rights law is far from over at the U.N..

Indeed, rather than a sign of OIC defeat, the new Human Rights Council resolution should be seen as a change in tactics. The concept of “defamation of religions” has no basis in international human rights law, which protects individuals, not religions as such. However, international human rights law *does* include hate speech prohibitions that encompass religion. Article 20 of the International Covenant on Civil and Political Rights states that “any advocacy of . . . religious hatred that constitutes incitement to discrimination [or] hostility . . . shall be prohibited by law.”

The recently adopted resolution includes several references to the wording of Article 20. However, it also mentions “derogatory stereotyping, negative profiling and stigmatization of persons based on their religion or belief” and “deplores any advocacy of discrimination . . . on the basis of religion or belief.” This wording is vague and unclear, and falls well below the threshold established by Article 20, opening this provision for abuse.

The resolution should thus be seen as an attempt by the OIC to broaden the scope of Article 20 to include instances of so-called Islamophobia.

One of the latest examples of this agenda could be witnessed at Denmark's Universal Periodic Review at the Human Rights Council – in effect a human rights examination of all U.N. member states - on 2 May 2011. Numerous OIC states complained that Islamophobia was ubiquitous in Denmark, often referring to the publication of cartoons of Muhammad and recommending that Denmark strengthen its enforcement of hate speech laws. Pakistan stated that:

The newspaper publication of cartoons about the Prophet Muhammad...shocked Muslims worldwide...and violated Articles 19 and 20 of ICCPR.

With reference to the Muhammad cartoons, Indonesia urged Denmark:

to prevent the reoccurrence of such irresponsible acts which merely perpetuate religious hatred and intolerance.

Disturbingly, the Danish government chose to accept these recommendations with reference to its existing hate speech laws. While Denmark is unlikely to amend the scope of the applicable law according to the wishes of the OIC, the acceptance of the recommendations is nonetheless a victory for the OIC. After all, the basic premise that the Muhammad cartoons and the Danish public debate about Islam constitute religious hatred contrary to ICCPR Article 20 went unchallenged by the intimidated Danish government.

The new OIC strategy based on broadening existing hate speech provisions is much more likely to succeed than would a continued insistence on combating defamation of religion. While most Western states have abolished or ceased enforcing blasphemy laws, all countries, with the exception of the U.S., have hate speech laws in place, and they are often actively enforced. In 2008, the EU adopted a framework decision that obliges all EU states to criminalize incitement to hatred, including on the basis of religion. The European Court of Human Rights generally does not protect hate speech and has upheld the conviction of politicians critical of Islam and Muslim immigration, as well as the confiscation and censorship of films insulting the feelings of Christians. Moreover, most Western human rights organizations, even ones dedicated to the protection of freedom of expression, while opposed to the concept of defamation of religion, support hate speech laws and their enforcement.

In the logic of those who oppose defamation of religions but support hate speech laws, it would thus be incompatible with freedom of expression to criminalize harsh attacks against Islam on the basis of protecting this religion against defamation, whereas such criticism could plausibly be criminalized on the grounds of inciting hatred against Muslims under hate speech laws as has happened in numerous European cases. While technically defamation and hate speech are distinct categories, they do overlap and in the OIC interpretation becomes almost indivisible.

Accordingly, unlike the situation with defamation of religion, Western states and mainstream human rights activists cannot reject an attempt by the OIC at broadening Article 20 out of hand without the risk of being accused of double standards. That is a powerful and persuasive accusation to be used at the U.N., where Western states often are in the minority and on the defensive, and therefore constantly have to compromise. If this strategy meets with success, the OIC will have successfully smuggled the concept of defamation of religion in through the back door using hate speech provisions that have been expanded to act as de facto blasphemy laws censoring criticism of Islam according to inherently vague legal norms that

lack any objective criteria. Such laws can then be used to justify harsh repression in Muslim majority countries and limiting the free debate on Islam in the West. All in the name of human rights and tolerance.

Considering the systematic repression of minorities and the denial of basic human rights in many Muslim-majority countries, it defies belief that the OIC has been able to dominate the agenda of the Human Rights Council with its insistence that “defamation of religion” and “islamophobia” should be prohibited under human rights law.

However, it is important to note that existing hate speech laws are not the result of Muslim states and individuals and that not only critics of Islam are being targeted. As we have seen, these restrictions on freedom of expression have a basis in international human rights law. But it is seldom acknowledged that the prohibition against hate speech in human rights law owes its existence to totalitarian, communist states, led by the Soviet Union, who won the vote when Article 20 of the International Covenant on Civil and Political Rights was debated at the U.N. during the Cold War. Most free democracies of the day were opposed to this development and voted against this provision.

The critics included the U.S. representative and chair of the Commission on Human Rights, Eleanor Roosevelt, who warned that prohibiting hatred “would encourage governments to punish all criticism under the guise of protecting against religious or national hostility.” She was right. Authoritarian states were allowed to turn the concept of human rights into newspeak legitimizing the very repression that human rights were supposed to guard against.

And, tragically, the victory of totalitarian states long since banished to the ash heap of history has consequences for how Muslims and non-Muslims alike can discuss Islam today. The international hate speech laws pushed by the OIC are therefore a poisonous legacy of totalitarianism.

While the pressure to prohibit certain forms of expressions under human rights law is therefore not a novel development, the concerted efforts to increase the scope of hate speech laws to include “Islamophobia” and criticism of Islam has created a new dividing line on the extent to which free speech should be limited. This time the dividing line is not between the West and communist states but between the West and Islamic states, with the West reluctantly fighting with one hand tied behind its back by the very hate speech laws promoted by the OIC.

One of the basic arguments underlying hate speech laws is that these encourage tolerance. But criminalizing offensive speech amounts to turning the very concept of tolerance on its head. According to this logic, freedom of expression and religion are conflicting rights and the latter entails a right not to be offended through the exercise of the former; an understanding that would have been deeply alien to the founders of this great country who understood that these rights are indivisible and therefore included them in the same constitutional amendment.

With protection for a loosely defined concept like religion, the self-proclaimed victims will be the ones who can determine when they feel offended and have governments to back them up. That is particularly dangerous in countries where the state is the guardian of religion – such as Iran and Saudi Arabia – since the prohibition will affect not only the ability to freely discuss religion but also the ability to criticize the government. But, it also empowers self-appointed representatives of Muslims in the West who use hate

speech and blasphemy laws to limit criticism of Islam at a time when discussion of Islam is more needed than ever. This has negative consequences not only for free speech, but also for the many Muslims in the West who accept and support the idea that free speech cannot be limited by religious feelings but whose voices risk becoming marginalized if through legal protection the sensibilities of fundamentalists are monopolized.

Since European states have long since accepted the logic of hate speech laws, it is crucial that America, with its First Amendment tradition, assumes global leadership in the protection of freedom of expression and religion. Such a role is likely to create diplomatic tensions among strategically important allies but, without American leadership, there is simply no state willing or able to champion these values based on principle. And, unfortunately, there are signs that the current administration may be willing to relax America's traditional principled stance.

A worrying example is the Obama administration's co-sponsoring at the U.N. of a resolution on freedom of speech with Egypt in October 2009. The resolution condemns "negative religious stereotyping." This concept clearly does not reflect the *Brandenburg v. Ohio* First Amendment standard, and, as mentioned, is not even included as one of the permissible restrictions of free speech under international human rights law; it thus constitutes an expansive interpretation of the prohibition against hate speech.

That was clearly the purpose of the OIC, which at the vote stated that "negative stereotyping or defamation of religions was a modern expression of religious hatred and xenophobia," thus linking defamation and hate speech. Hardly the interpretation the U.S. had in mind. In December 2011, the U.S. State Department will likely hold a joint conference with the OIC aimed at defining and combating "negative religious stereotyping," therefore lending legitimacy to the OIC's agenda and underlying premise that it is in the West – not in OIC countries – that religious minorities are being discriminated and persecuted.

Respect for freedom of expression and religion is the hallmark of free societies and the first rights to be circumscribed by illiberal states. It is a sad reflection on contemporary human rights standards and on Europe that the increasing emphasis on shielding Muslims from "offensive" and "blasphemous" words is championed by the illiberal states of the OIC taking their cue from the legacy of the very totalitarian states with which Western Europe was locked in an ideological battle during the Cold War. If the concept of human rights is to serve freedom then surely – to paraphrase Orwell – freedom of expression and religion must include the right to tell people what they do not want to hear.