The rise (and fall?) of defamation of religions

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The Rise (and Fall?) of Defamation of Religions. By Lorenz Langer

In the autumn of 2009, the controversy over the Muhammad cartoons reached Yale University. The decision by Yale University Press to remove not only the reproduction of the Danish drawings, but also any depiction of the prophet from an upcoming book on the cartoons drew angry comments from several quarters. Defenders of free speech clashed with those demanding consideration for Muslim feelings, as well as those worried about a potentially violent response to the cartoons.

This latest episode in the cartoon saga shows that the balance between freedom of expression and the protection of religious sensitivities is still elusive. Whether reprinted by the Press or not, the cartoons are now in the public domain, where they will provide a ready means to cause offense for decades to come. Adherents of a religion might be more hurt by insults to their faith than by (penalized) libel of their own person. Yet making religions (or their interpreters) the arbiter over what may be said would impose considerable constraints on public discourse.

Discussion about the limits of speech can be framed in moral, religious, legal, or political terms, or a combination thereof. When the Muslim world took offence at Salman Rushdie’s novel The Satanic Verses, the response was almost exclusively religious, with Ayatollah Ruhollah Khomeini’s fatwa as the sad apogee. The Danish cartoons sparked violence, but also court proceedings in national, regional, and international fora. The reaction of Muslim governments was couched in legal terms instead of religious condemnation: from the outset, elites in Muslim states relied on international law and human rights norms to denounce defamation of religions as a violation of human dignity. They also insisted that the international legal framework addressing the balance between freedom of expression and protection of religion was deficient, claiming that it did not sufficiently

1. The cartoons first appeared in Flemming Rose, *Muhammeds Ansigt* [The Face of Muhammad], JYLLANDS-POSTEN, Sept. 30, 2005, at 3 (Den.).
5. The lines between these different types of discussions can often be difficult to draw. Swearing, for instance, is morally frowned upon, but can also lead to religious sanctions, see *Exodus* 20:7; *Leviticus* 20:9, 24:10-16, or legal sanctions, see FCC v. Pacifica Found., 438 U.S. 726 (1978). The Sedition Act used legal means for political ends. Act of July 14, 1798, ch. 74, 1 Stat. 596.
7. For a detailed account, see KLAUSEN, supra note 2.
safeguard religious feelings, that its implementation was ridden with double standards, and that it therefore needed to be complemented with provisions banning defamation of religions outright. This view is consistent with the abortive attempts by Muslim associations to obtain a ruling on the cartoons in an international forum; however, both the European Court of Human Rights and the Committee on Human Rights dismissed the respective applications on procedural grounds.9

This Recent Development retraces the demands for protecting religions from offense and the attempts to initiate the drafting of new legal instruments to ensure such protection. While several international human rights conventions contain provisions that address freedom of religion, there is no instrument that exclusively focuses on religion or its protection. Efforts to draft a convention against religious intolerance date back to the 1960s, but resulted only in the nonbinding 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.10 The Declaration was directed against discrimination of individuals by “any State, institution, group of persons or person on the grounds of religion or belief.”11 In contrast, the broader concept of “defamation of religions” raised by the cartoons controversy encompasses the creed itself. This concept made its first appearance before the cartoons, when Pakistan, on behalf of the Organization of the Islamic Conference (OIC), introduced a draft resolution on combating “[d]efamation of Islam” in the U.N. Human Rights Commission in 1999.12 The resolution was to counter “new manifestations of intolerance and misunderstanding, not to say hatred, of Islam and Muslims,” and to oppose portrayals of Islam as a religion hostile to human rights.13

Suggestions by some Commission members to broaden the scope to other religions were first resisted by an insistence that “the problem faced by Islam was of a very special nature.”14 After protracted haggling, however, Pakistan introduced a revised draft resolution which encompassed religions in general while still emphasizing the particularly vulnerable situation of Islam. This second draft was adopted by the Commission without a vote.15 The resolution’s operative part expressed concern about “negative stereotyping of religions”16 and about “any role in which the print, audio-visual or electronic media or any other means is used to incite acts of violence, xenophobia or

11. Id. art. 2, para. 1.
14. Id. ¶ 7.
16. Id. art. 1.
related intolerance and discrimination towards Islam and any other religion.\textsuperscript{17} Under this formulation, the objects of protection are Islam and other religions, rather than individual adherents of religions. In international law, discrimination on racial, ethnic, or religious grounds, however, is generally understood to be directed against persons or groups of persons.\textsuperscript{18} The resolution did not elaborate on how the same concept could be applied to religions, beliefs, or ideologies, or who would decide when a religion had been defamed.

The Commission adopted a similar resolution by consensus in 2000, after several draft resolutions and amendments, and protracted discussion\textsuperscript{19} with the European Union urging the sponsors not to raise the issue again in the Commission.\textsuperscript{20} Unperturbed, Pakistan introduced another draft resolution in 2001.\textsuperscript{21} This time, however, consensus proved elusive. The Belgian representative, speaking on behalf of the EU, criticized the OIC for protecting religions rather than the rights of individuals.\textsuperscript{22} Nevertheless, the resolution was adopted.\textsuperscript{23} The Commission also voted on resolutions on defamation of religions in 2002,\textsuperscript{24} 2003,\textsuperscript{25} 2004,\textsuperscript{26} and 2005.\textsuperscript{27}

Thus, defamation of religions and Islamophobia figured prominently on the international agenda of Muslim states even prior to the publication of the cartoons in September 2005. At that stage, no claims for additional legal instruments were being made, and the issue was receiving a muted institutional response within the United Nations\textsuperscript{28} and little news coverage. Once the cartoons were published, the campaign against defamation of religions and Islamophobia garnered greater attention and was raised in

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\item \textsuperscript{17} Id. art. 3.
\item \textsuperscript{20} Record of the 67th Meeting, \emph{supra} note 19, ¶ 75.
\item \textsuperscript{23} All European countries on the Commission as well as Canada, Japan, and the United States voted against. \emph{Id.} ¶ 10.
additional fora. Yemen introduced a resolution condemning defamation of religions in the U.N. General Assembly, which was adopted in a vote split along the trenches established by the previous votes in the Commission on Human Rights.\(^{29}\) The OIC held an Extraordinary Islamic Summit session in Mecca in December 2005 to address the defamation campaigns against Muslims and Islam itself. The assembled head of states expressed “concern at rising hatred against Islam and Muslims and condemned the recent incident of desecration of the image of the Holy Prophet Mohammad (PBUH) in the media of certain countries” and emphasized “the inapplicability of using the freedom of expression as a pretext to defame religions.”\(^{30}\)

Over the next four years, defamation of religion was a constant topic at international and regional meetings. The newly established Human Rights Council decided at its first session to request reports on defamation of religions by the Special Rapporteur on Freedom of Religion, by the Special Rapporteur on Contemporary Forms of Racism, and by the High Commissioner for Human Rights.\(^{31}\) The reports were to focus on the implications of defamation under Article 20(2) of the International Covenant on Civil and Political Rights, which requires states party to prohibit by law any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence.\(^{32}\) The reports, however, were cautious about subsuming defamation under Article 20(2).\(^{33}\)

Representatives of Muslim countries therefore felt justified in insisting on stronger remedies, suggesting that the Human Rights Council draft “a legally binding instrument to combat defamation of religions and uphold respect for religions and beliefs.”\(^{34}\) The OIC Summit conference in 2008 declared all acts “which defame Islam as heinous acts that require punishment.”\(^{35}\) The OIC authorized its Secretary-General to constitute a group of experts to draft “a legally-binding international instrument to promote respect for all religions and cultural values and prevent discrimination and instigation of hatred vis-à-vis the followers of any religion.”\(^{36}\)

At the same time, the OIC continued to press the issue of defamation at the United Nations. Both the General Assembly and the Human Rights Council


\(^{36}\) Id. ¶ 177.
Council passed resolutions in 2007 and 2008. The OIC and the Groups of Arab and African States also amended the resolution extending the mandate of the Special Rapporteur on Freedom of Expression to cover “instances in which the abuse of the right of freedom of expression constitutes an act of racial or religious discrimination.” The concept of defamation of religions, now seemingly established on the international level, figured prominently on the agenda of NGOs and was reported by the media.

Proponents of defamation hoped to further entrench and codify the concept at the U.N. Durban Review Conference scheduled for 2009. The 2001 World Conference against Racism in Durban had not addressed the issue of religious defamation, but the Durban Programme of Action had recommended preparing complementary international standards to strengthen international instruments against racism, racial discrimination, xenophobia, and related intolerance. To this end, the Council convened a group of experts to analyze the gaps in existing international instruments and to deliberate on the adoption of additional protocols or new conventions. An ad hoc committee of Council members was then to implement their findings. When the experts concluded that current legal instruments sufficiently covered the combination of religious intolerance and racial prejudices, they were chastised by Muslim member states for disregarding their mandate.

This was arguably the high point of the push for international defamation law. In March 2009, an extensive version of the obligatory resolution was passed by the Council. Western countries feared and Muslim

countries hoped that the Durban Review Conference would see a decade of promoting religious defamation rewarded by the initiation of codification. Yet “defamation of religions” did not feature at all in the outcome document of the Review Conference, despite Muslim states’ insistence on the importance and validity of the concept. Instead, the document underscored the paramount importance of freedom of expression. At the Review Conference, the Special Rapporteur on Freedom of Expression had stated that it was “crucial” to remove defamation from the final outcome document. Eventually, the OIC accommodated the Western states’ insistence on omitting defamation. Clearly, this came as a surprise. As late as October 2008, the proposals for the outcome document of the Review Conference had still made numerous references to defamation and demanded new normative standards.

For some time after the Review Conference, defamation all but vanished from the international agenda. The 11th and 12th sessions of the Human Rights Council did not pass resolutions on defamation, but instead adopted a compromise resolution on freedom of expression co-sponsored by Egypt and the United States. The end of defamation of religion seemed to be imminent. While the OIC still pushed to draw up new legal instruments, the momentum on the international level seemed lost. Even if the OIC itself adopted a new legal instrument, the effect would be limited since the organization primarily takes issue with the treatment of Muslims in non-Muslim states. It would seem that the representatives of OIC member states were somewhat flushed with their influence in U.N. bodies. In the flood of resolutions they overlooked that U.N. rapporteurs and experts consistently argued against the need for new legal standards.

It is too soon to say whether this indicates the waning of defamation.
The OIC might well decide that the domestic benefits of passing annual resolutions in the Human Rights Council outweigh the cost of antagonizing the Western states. Muslim members of the Ad Hoc Committee continue to insist that new legal instruments are indispensable. New efforts are underway to pass another resolution on defamation in the General Assembly in 2010 with a view to drafting a binding instrument. Suddenly, defamation of religions seems to be well and alive again.

But repetitive resolutions without result would underscore that nothing beyond grandstanding can be achieved. Even if a new international instrument or additional protocol were eventually to emerge at the United Nations, it is unlikely that Western governments would feel compelled to become a party to it. While indicating that they were not unsympathetic to complaints of discrimination against Muslims, European regional institutions have also made it clear that they do not see the prohibition of defamation of religions as a viable solution to such grievances.

Defamation of religions will be with us for some time to come. But its proponents have yet to provide a convincing rationale why—and especially how—religions rather than individuals should be protected from insult or discrimination. The mere fact that some Muslim countries impose severe penalties for blasphemy cannot warrant a ban on the international level. Nor is it clear who would authoritatively decide when a transgression has occurred; courts would be ill-equipped to adjudicate religious commands. The emancipation of the public sphere from control by religious authorities is too important an achievement to be jeopardized by a vague, novel concept.

61. See Inhorn, supra note 4.