

The U.S. First Amendment Tradition

and Article 19 of the Universal Declaration of Human Rights:

After Sixty Years, What Relationship?

By Floyd Abrams ^[1]

It is both a great honor and a great pleasure to have been invited to deliver the 20th Annual Anderson-Ottoway Lecture here today. The honor stems from multiple reasons: the inviting organization, the World Press Freedom Committee, has been an extraordinary leader in battling for free speech rights here at the UN and elsewhere since its founding 32 years ago; the individuals after whom this lecture series was named not only had distinguished journalistic careers, served as the Chairmen of the Committee for most of the years of its existence; and now serve as its emeritus chairmen; and the current chairman is Richard Winfield, a great and devoted First Amendment lawyer and a comrade of mine for many years in seeking to protect free speech principles in this country. The other honor, of course, is that tomorrow is the 60th anniversary of the adoption by the UN of the Universal Declaration of Human Rights, which has aptly been called a Magna Carta of humankind.

For an American lawyer, there is special pleasure in rereading the ringing language of the Universal Declaration and for a lawyer steeped in American First Amendment law there is exquisite pleasure in rereading Article 19. One finds there something that James Madison wanted to put in the Bill of Rights but could not gather sufficient support for--the protection of freedom of conscience, or, as Article 19 of the Universal Declaration puts it, "the right to freedom of opinion." Madison had proposed the inclusion of language in what became the First Amendment stating (in the stark negative language of that provision) "nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." Jefferson too had emphasized the centrality of freedom of conscience, including in his bill for religious freedom adopted in Virginia in 1786 the affirmation that "the opinions of men are not the subject of civil government, nor under its jurisdiction." To that, Madison responded that the Virginia Act had "extinguished forever the ambitious hope of making laws for the human mind." That turns out to have been a bit of an overstatement and unfortunately the effort failed to include protection for freedom of conscience in the First Amendment. It is more than cheering to find it in the Universal Declaration.

When the World Press Freedom Committee was formed, the most critical issues before The UN relating to freedom of speech arose out of efforts by and at UNESCO, under its then-leadership, to establish what was characterized as a "New World

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Information and Communication Order", a euphemism for greatly increased state control of what was said and written. That battle lasted for many years and was finally won, with the tide ultimately beginning to change in 1989 as UNESCO changed its leadership and direction under its new Director-General, Federico Mayor.

Today we have a new threat to free speech and freedom of conscience, with powerful proponents in this building. It is one that is not only contrary to American First Amendment notions but to the core of the protections set forth in Article 19 of the Universal Declaration. The threat relates to speech about religion and, in particular, speech that could be said to be critical--or, in the language used by its proponents, "defamatory"--of religion. Just a few weeks ago, the Third Committee of the General Assembly approved a resolution sponsored by Uganda on behalf of the 57-nation Organization of the Islamic Conference ("OIC"), Venezuela and Belarus, which would call upon member nations to take steps to ban or punish what is variously referred to as "defamation of religion," "incitement to hatred" of religion, or the like. Initially introduced in 1999 by Pakistan before the Commission on Human Rights on behalf of the OIC at a time when it related, by its terms, only to defamation of Islam, it has increasingly been pressed by Islamic states as a sort of response to, among other supposed verbal misconduct, the now memorable cartoons published in Denmark in 2005 portraying the Prophet Mohammed. The recent vote within the Third Committee was 85 in favor and 50 against, with 42 abstentions, an extremely close vote in UN terms, and one significantly closer than last year's vote of 108 in favor to 51 against, with 25 abstentions. But however close the vote was, the threat of a General Assembly vote to the same effect is very real, as is that of adoption of similar resolutions in the Human Rights Council in March, the Durban II Conference in April, and other international bodies well into the future.

Perhaps we should not be surprised by this. Notwithstanding the existence of Article 19, the UN has not been a particularly vigorous protector or even advocate of freedom of speech around the world. The great English human rights lawyer Geoffrey Roberson, in a speech he gave a few weeks ago in Vienna, attributed this to the fact that half the members of the UN "are undemocratic and because more than half its members curb free speech." Whatever the reason, the reality is that the UN has done little to protect freedom of speech in its member states. Now it is asked to go beyond that by affirmatively urging its members to curb free speech, to punish it, to criminalize it.

Before I turn to the potential impact the OIC resolution, let me say a few words about the American treatment of any such law, if it were to be adopted in the US. It would be an easy case. As one of our greatest First Amendment scholars, Professor Harry Kalven, put it:

"Throughout history, religion has played a dismal role as a source of motivations for censorship. If a community believes it is in possession of a revealed truth and the salvation of man's soul is at stake, indifference will no longer protect and it becomes altogether rational to pay close attention to what people are allowed to say, especially publicly. From

such a perspective, prohibitions of heresy and blasphemy make sense.
[But *i*n America there is no heresy, no blasphemy.]”

Nor, I would add, is there any support here for the notion that offensive speech about any religion or all of them may be punished.

It is worth pausing for a moment on how and why our law became so clear on that issue. The classic case on that subject, Cantwell v. Connecticut, began on a street corner in New Haven in 1938, ten years before the Universal Declaration was adopted.

On April 26, 1938, Newton Cantwell and his two sons, all of whom were Jehovah’s Witnesses, arrived on a street in New Haven where ninety percent of the people were Roman Catholic. The Cantwells were equipped with a record player and a bag containing books and pamphlets of their preachings. They went door to door and with the answerer’s permission played one of their records. The Cantwells stopped two passersbys, both Catholics, and asked for and received their permission to play a record. What they heard, entitled “Enemies,” was an angry, sometimes venomous, attack on organized religion in general and the Roman Catholic Church in particular. Among the materials contained on the record “Enemies,” and played for and to its listeners, were passages such as this:

“The most seductive and subtle instrument employed to deceive man is religion, because religion has the appearance of doing good, whereas it brings upon the people great evil. There are many different religions, all of which are deceptive, are the instruments of the enemy Satan, and all work to the injury of men. This book submits the conclusive proof that for more than fifteen hundred years a great religious system, operating out of Rome, has by means of fraud and deception brought untold sorrow and suffering upon the people. It operates the greatest racket ever employed amongst men and robs the people of their money and destroys their peace of mind and freedom of action. That religious system is vigorously pushing its political schemes amongst all the nations of earth, with the avowed purpose of seizing control of the nations and ruling the people by cruel dictators. Some of the nations have fallen under that wicked power, and all nations are now greatly endangered. Because of the increasing power of the enemy the liberties of the people are rapidly passing away and all nations are rushing into infidelity and into ultimate destruction.”

Upon hearing such assertions and others that referred to the Church as a “harlot” that brought fascism and Naziism into being, one of the two listeners told the Cantwells that they had better leave the area before something happened to them. They did so, but were later convicted of, among other things, inciting breach of the peace. The U.S. Supreme Court ultimately reversed the convictions, concluding that “the fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged.” While a state has a right to preserve peace and order within her borders, the Court said, it

“may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions.”

Here, the Court said, the Cantwells were on a public street, where they had every right to be and to impart their views peacefully to others. They had asked the permission of those they had met before playing their record and had received permission to do so. By playing their record, they had not impeded traffic.

The essential characteristic of religious liberty, the Court concluded, was that people could express their views “unmolested and unobstructed.” In a country such as the United States in which people from so many nations and creeds coexisted, the Court said, the shield that protects the right to exercise and disseminate different religions was especially necessary. “In the realm of religious faith,” the Court explained, as well as

“that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.”

In some respects, the American approach to this subject is unique in the world. When the International Covenant on Civil and Political Rights was drafted in 1966 and thereafter ratified by most nations in the world it contained language in Article 20 that provided that "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." While the US does recognize that even in the face of an extremely broadly written First Amendment, incitement to violent acts can in certain narrow circumstances be penalized, the notion of "incitement to discrimination" could be interpreted far more broadly than our Constitution permits. As a result, when President Carter signed the treaty in 1976, he included a reservation that stated that "Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution...of the United States."

So what is protected under the First Amendment? Certainly speech such as that of the Cantwells that harshly criticized one religion in the service of trying to persuade listeners to join another. Certainly the Danish cartoons themselves (the subject, incidentally, of the last lecture in this series, a powerful defense by Joergen Ejboel, Chairman of the company that owned the Danish newspaper that published the cartoons, of the decision to print them). Certainly books such as Salmon Rushdie's "The Satanic Verses", which offended many Muslims. Certainly movies such as Mel Gibson's "The Passion of the Christ", which offended many Jews, and "The Last Temptation of Christ," which offended many Christians. And certainly works of art such as Chris Ofili's "The

Holy Virgin Mary,” a painting which contained elephant dung (considered regenerative in Nigerian tribal culture) on the depiction of the Virgin Mary and which so inflamed New York’s then-mayor Rudolph Giuliani for supposedly being sacrilegious that he, quite literally, sought to close down the Brooklyn Museum. Are any of those--all of them?--the stuff of "defamation of religion"?

As I said before, the very purpose of the proposed resolutions was to respond to, among other published works, the Danish cartoons. There is no doubt that they are, in the minds of the drafters of the resolutions, precisely what should not be--and what should not be allowed to be--published. As for the others, who can say? All of these examples could plausibly be viewed as defamatory, although as The Becket Fund has observed in its critical comments submitted to the UN Office of the High Commissioner for Human Rights, the resolution might better be titled "The Protection of Religious Sensibilities" to reflect more accurately what it is really about.

While the resolution, by focusing on "defamation" of religion, has significant vagueness problems--just how critical must one be to be characterized as engaging in defamation?--we do have a way to see how such an approach would work in practice since many nations already have such laws. The response of the United States earlier this year to a similar proposal made before the United Nations Office of the High Commissioner for Human Rights is telling in listing examples of how anti-defamation provisions have been used to punish minority religious communities or dissident members of a majority faith. They included the following:

- “In January 2008, a provincial court sentences a student to death for distributing “blasphemous” material regarding the role of women in Islamic societies. The student was arrested in October 2007 for downloading the material from the internet and passing it to students at the university he attended.
- In December 2007, a court reportedly sentenced two foreigners to six months in prison for allegedly marketing a book deemed offensive to Aisha, one of Prophet Mohammed’s wives.
- In November 2007, a court sentenced a British teacher to 15 days in jail for “insulting religion,” after she named a class teddy bear Mohammed. A 7-year-old student named Mohammed had reportedly requested that the bear be named after him. The teacher was pardoned and deported the following month.
- In February 2007, a court sentenced an internet blogger to three years in prison for his comments that critiqued of the practice of Islam. He remains in prison.
- In January 2007, a court gave two writers a three-year suspended sentence and fined them \$8,000 for “defaming Islam” in a magazine article.

Publication of the magazine was also suspended for two months.

- In January 2007, authorities arrested a Christian on charges of blasphemy for allegedly making derogatory remarks about the Qur'an. She was held until May and released on bail."

There is an additional deeply troubling aspect to the imposition of sanctions for so-called religious defamation. As the European Centre for Law and Justice has pointed out in a recent study of the issue, it appears "that laws based on the concept of 'defamation of religion' actually help to create a climate of violence. Violators of these laws, as applied in most Muslim countries, are subject to the death penalty, which frequently encourages people to take matters into their own hands."

The ECLJ study cites an example from Pakistan, in which a 22-year-old Hindu "was beaten to death by co-workers at a factory for allegedly committing the crime of blasphemy, which is a crime punishable by death in the country. The three workers who carried out the beating were arrested, charged not with murder but with 'failure to inform the police that blasphemy was underway.'" The ECLJ study quotes a human rights activist based in Islamabad who observed that: "Not a single murderer who killed anyone for blasphemy has been punished for murder. In fact, such murderers get hero's treatment in police stations. And those police officials who openly honor such murderers have never been tried for their illegal and reprehensible action."

To say this is not to suggest that hearing someone defame one's own religion is not disturbing or that one does not wish sometimes — "often" might be a better word — that offensive criticism had not been voiced at all. To cite a personal "favorite" of mine, who do you think said the following? Jews are "an ignorant and barbarous people who have long united the most sordid avarice with the most detestable superstition and the most invincible hatred for every people by whom they are tolerated and enriched. Still, we ought not to burn them." To whom should we be grateful for that passage, including its last line? To Voltaire, no less, writing in 1756 — yes, the same enduring proponent of tolerance and brotherhood that we so often honor for just that advocacy.

Let me offer another historical example that you will recognize. The year was 1517, the writer was Martin Luther and the writing was the first great act in moving the world into the Reformation. Luther's courage in posting his 95 Theses on the Castle Church in Wittenberg has long been recognized as a signal moment in world history. But we should not forget just how defamatory was what Luther had to say about the Roman Catholic Church. He condemned the Church for selling indulgences; he characterized as "madness" the notion the papal pardons could absolve someone for sins committed; he criticized the Pope for not paying for the restoration of St. Peter's Cathedral out of "his own money rather than the money of poor believers."

At least as viewed from Rome, Luther had accused the Church, maligned the Church, defamed the Church. That conduct ultimately led to his excommunication and,

in time, the creation of a Protestant Church in Germany and a Reformation throughout Europe. It is difficult to believe that anyone would seek to justify suppressing that speech today.

It may seem a touch too hypothetical to consider the impact of the OIC resolution on Martin Luther's sixteenth century offerings. But the potential impact today of that effort is anything but hypothetical. For there is no ambiguity about what it seeks to do. Its purpose is nothing less than to stifle criticism of Islam itself. In fact, earlier versions of the resolutions limited its scope to defamation of Islam and no other religion. It would suppress such speech by subjecting writers, publishers, artists and all others to sanctions if they came too close to the all-but-unknowable line that separates "defamation" of Islam from ...what? Consider the examples I quoted earlier from the US submission to the UN Office of the High Commissioner for Human Rights. Would it--could it--constitute defamation of Islam to criticize regimes that punish people for blasphemy for publishing materials that criticize Islam for its treatment of women? Or to criticize Islam itself for the same thing? Is it, could it be viewed as, religious defamation to mock those involved in sentencing a British teacher to jail time for naming a class teddy bear Mohammed? The answer, alas, is all too clear.

From the very first OIC resolution to the current one there has never been any ambiguity about its purpose. As phrased in the original OIC resolution introduced by Pakistan in 1999, Islam was "frequently and wrongly associated with human rights violations and terrorism." The resolution was drafted in an effort to end that "association." But it is a fact that however one may debate about whether "Islam" bears any responsibility for acts of terrorism ranging from the murderous 9/11 attacks on this city and Washington to the more recent massacre in Mumbai, terrible acts of violence have been committed in the name of Islam. It is also the case that repeated human rights violations, including female genital mutilation, have also occurred in the name of Islam.

It is one thing to urge that all Muslims should not be criticized because of these acts. I agree with that proposition. But I could not disagree more with the notion that it may or should be made a *crime* even to "associate" Islam with crimes too often committed in its name. What cannot be even negotiable is the freedom, the unfettered freedom, to publish books such as "The Satanic Verses," and - - yes - - the Danish cartoons as well. The effort by the OIC to withdraw significant subjects from public debate cannot withstand the slightest breeze from Article 19.

In saying that, I recall clearly a New Yorker cartoon of several years ago. It shows the U.S. Supreme Court listening to an argument. One member of the Court whispers in the ear of a colleague "Do you ever have a day when everything seems unconstitutional?" I want to assure you that I really don't think about things that way. The OIC resolution is really at war with Article 19 as well as with the First Amendment.

I do not want to leave you with the notion that it is inevitable that either the UN or other international bodies will persist in legitimizing the notion that criticism of religion is hereafter to be off-limits in public debate. Some signs are bleak. The recent vote of

the Third Committee, while less overwhelming than that of a year ago, still favored those who would suppress free speech rather than respond to it. And earlier this year, the President of the Human Rights Council ruled that religion could not even be discussed at the Council following repeated objections by Egypt to an intervention criticizing the stoning to death of women accused of adultery and of girls being married at the age of nine years old in countries where Sharia law applies.

But neither at the UN nor elsewhere are all longer-term signs negative. The United Nations' experts on human rights, the Special Rapporteurs on Freedom of Religion or Belief, on Freedom of Expression, and on Contemporary forms of Racism, Xenophobia and Related Intolerance have all spoken out clearly against creating a ban on such a vague notion of "defamation of religion." At a joint paper presented at a conference convened by the Office of the High Commissioner for Human Rights on in October, Ms. Asma Jahangir and Mr. Doudou Diene observed, "Freedom of Religion primarily confers a right to act in accordance with one's religion but does not bestow a right for believers to have their religion itself protected from all adverse comment."

Recently, I wrote a letter to Ambassador Miguel d'Escoto Brockman, the President of the General Assembly, on behalf of a group of organizations that have banded together to create what we have called The Coalition to Defend Free Speech. I serve as the Honorary Chair of the Coalition and I take the liberty of quoting one paragraph of my letter:

"While it may seem a natural response to decry the idea of defaming one's religious beliefs, the implications of doing so present a great danger. Are religions to be totally immunized from criticism? If so, the world would be denied a good part of its most enduring literature and religions themselves denied much valuable commentary. And if not, who is to decide what critical speech is to be permitted and what is to be deemed to be "defamatory" and thus banned? The lesson of history, after all, is that censorship of speech leads inexorably to more censorship."

I believe that lesson is one we ignore at our peril.