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Speech, Religious Discrimination, and Blasphemy: Remarks

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merits and to engage and encourage everyone to debate the issues on the merits and not on other grounds.

Mr. CARDOZO: The Secretary of State's Advisory Committee on Private International Law is a very good example of outside lawyers participating in that kind of process.

Ms. VERVILLE: Professor Moore, we do make considerable use of outside lawyers as experts, as consultants on particular issues, on arbitrations, on various matters that arise. There is a distinction between using outside lawyers in an advisory capacity to do a certain job for you and provide certain advice, and making them in essence a public official by giving them duties akin to someone who is in the government. There is a line to be drawn, but we do make considerable use of outside attorneys on specific issues.

WILLIAM B. T. MOCK*
Reporter

SPEECH, RELIGIOUS DISCRIMINATION, AND BLASPHEMY

The panel was convened by its Chair, Hurst Hannum,** at 10:45 a.m., April 7, 1989.

REMARKS BY HURST HANNUM

In September of 1988, Salman Rushdie published *Satanic Verses*. It received moderately good reviews and sales, when suddenly in February of 1989, it became the object of massive protests around the world, primarily in Islamic countries. These protests led to, among other things, the deaths of six people in riots in Pakistan, a death sentence against Mr. Rushdie pronounced by the Ayatollah Khomeini, the severing of diplomatic relations between Iran and the United Kingdom, the banning of the book in several countries, and even the halting of sales in Canada while the government considered what action to take.

This conflict between freedom of expression and religious belief is certainly not peculiar to Islamic culture. The Rushdie incident simply happens to be its most recent expression. Names like Socrates and Galileo leap to mind, as well as the censorship exercised by the Catholic church over the centuries in countries that were formally or avowedly Catholic. Restrictions on the espousal of religious beliefs have also been imposed, such as Norway's denial of entry to Jesuits, and the prohibition against arguing for the imposition of Islamic law in the current Turkish Constitution.

International human rights law has attempted to strike a balance between religious beliefs and freedom of expression. Article 19 of the Covenant on Civil and Political Rights protects the freedom of expression as well as the right to hold opinions without interference. It also notes that the exercise of the right of freedom of expression carries with it special duties and responsibilities. Article 20 of the Covenant states that any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence, shall be prohibited by law. A similar provision is contained in the Convention Against Racial Discrimination.

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Finally, in the Declaration on the Elimination of all Forms of Intolerance, and of Discrimination based on Religion and Belief, adopted by the General Assembly in 1981, one finds the quite remarkable statement in article 3 that “[d]iscrimination between human beings on the grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations.” Even for states, I would suggest, discrimination of certain kinds based on religion is fundamental. Many countries have religious requirements for public service, and individuals discriminate on the basis of religion every day, if only by choosing to go to a certain church, or to no church. The United States Congress, for example, begins its sessions with a Christian prayer every day. That all religious discrimination, even by a state, is an affront to human dignity, is perhaps an ideal that many of us share, but one that is very far from reality.

The panel will discuss the balance to be struck between freedom of expression and minority rights on the one hand, and the rights of the majority to practice their religion and prohibit offensive behavior on the other hand. The questions we must ask include: why does international law give religion a special place at all? Why is belief associated with religion protected to a greater extent than other beliefs? Is a religious state, of which there are many in the world, compatible with modern human rights norms? Should there be a distinction between the prohibition of propaganda that might arouse religious hatred and that which might advocate racial hatred? Finally, how does one distinguish between the will of the majority to enact laws based on moral judgments, a power that is the very foundation of democracy, and the suppression of religious freedom due to intolerance?

REMARKS BY VIRGINIA LEARY*

I will be talking about what is referred to in Canada as Hate Propaganda Laws. This topic is somewhat broader than the subject of religious discrimination, but it does relate very closely to freedom of expression, freedom of speech, and questions relating to discriminatory remarks made against ethnic and racial as well as religious groups.

As Mr. Hannum mentioned, Mr. Rushdie’s book *Satanic Verses* was detained by Canadian customs authorities while they tried to determine if the book violated the Canadian Criminal Code. It was decided eventually that the book did not violate the Code, and it was permitted into Canada. However, the very fact that it was detained caused many people in other countries to focus on what the Hate Propaganda Laws were really concerned with. Before going into detail about the Canadian laws, however, I wish to make a few general remarks.

The call for Mr. Rushdie’s death by the Ayatollah was so outrageous and condemnable that it obscures for us some realities that this issue raises. One of these is that religion is very important to many people throughout the world. On several trips to Asia, I have been struck repeatedly, not only by the importance of Islamic fundamentalism but by the importance of religion in general to the ordinary person. Living in a secular society, we do not realize the force or the strength of religious views, and how sensitive and sacred they are to many of the people around the world. We can better understand this issue by something that happened within a few feet of this hotel recently at the Art Institute of Chicago. That incident shows that our society has substituted national and secular symbols for religious ones. In this incident, an artist named Scott Tyler placed an American flag on the floor as part of a work entitled “What is the Right Way to Display the American Flag?” As part of the display, visitors walked

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on the flag. The violent reaction from various veterans groups suggests that our society also has sacred symbols, but I trust we do not urge the death of anyone who violates them.

Questions of freedom of speech and freedom of expression can be viewed in different ways even within the Western liberal tradition. This point brings me to the Canadian Hate Propaganda Act.

This Act must be viewed within the context of the legal and political structures, attitudes, and cultures in Canada. Under the Criminal Code in Canada, it is an offense to "willfully promote hatred against people distinguished by race, religion, or ethnic origin." To merely emphasize a few aspects, the Act criminalizes only the willful intent to promote hatred against people on the grounds of race, religion, and ethnic origin. The Act also permits a number of defenses, specifically: speaking the truth, believing in the truth of what one is saying, contributing to an ongoing debate, disagreeing with certain fundamental religious truths, and so forth. Thus, the Act is rather limited, and is designed to punish only the most egregious abuses of free speech.

This Act was adopted during the 1960s when there was concern over hate literature circulating in Canada, especially anti-Semitic literature. Because of concern over the circulation of such literature, a distinguished commission was appointed, headed by Maxwell Cohen, at that time Dean of Law at McGill University. (Incidentally, Pierre Trudeau was also a member of the commission.) The conclusions of the commission were that the spread of hate literature, defined as willfully promoting hatred against a group of people on racial, religious, or ethnic grounds, constituted a clear and present danger in Canada, and that there should be legislation against it. The Act was adopted in 1970. Since that time there have only been about a dozen prosecutions. However, there are two cases currently on appeal that have elicited a great deal of interest.

The first of the two cases is the *Keegstra* case. Mr. Keegstra was a high school history teacher in Alberta who said that he had discovered a plot of the Jews to take over the world and found it necessary to teach this to his high school class. He was prosecuted under the Act and eventually convicted, but on appeal to the Alberta Court of Appeals, the Court ruled that the Hate Propaganda law was overly broad and in violation of the Canadian Charter of Rights.

The second important case, also currently on appeal, is the *Zundel* case. Ernst Zundel was an immigrant to Ontario from Germany, a neo-Nazi, who published a pamphlet entitled "Did Six Million Really Die?" that denied the Holocaust happened. He was also prosecuted and convicted under the Act. The Ontario Court of Appeals held that the Act was not overly broad and was not contrary to the Charter of Rights in Canada. The *Zundel* case is also currently on appeal before the Supreme Court of Canada.

Two conflicting decisions from different provinces in Canada demonstrate how controversial this subject is. In addition to the differing decisions of the courts, there is considerable controversy in the legal literature. Why is this Act so controversial in Canada? With our strong emphasis on the First Amendment, we do not need a lot of explanation to understand opposition to the Act. Various civil liberties groups in Canada are by and large opposed to the Hate Propaganda Law, while on the other hand, two groups especially, and perhaps even three, are in favor of the law, but with limits. In general, women's groups, minority groups, and indigenous groups have favored the Act. This alignment illustrates the difference in the legal and political culture of Canada and the United States. Canada has the same roots in the Anglo-Saxon legal system as the United States, but when one looks deeper, differences emerge. You

often hear in Canada of the importance of peace, order, and good government. It is noted in Canada that the United States resulted from a revolution, and that the general attitude there is antigovernment. In Canada, by contrast, the government is looked upon as a protector of rights. Those who defend the Hate Propaganda Act argue that multiculturalism is extremely important in Canada today, and that the Act promotes it. Canadians distinguish multiculturalism from the "melting pot" concept in the United States. There is a desire to maintain the distinction between the different cultures in Canada. Thus there is an emphasis on group rights and on communal rights, an emphasis we do not have in the United States. But there is also an emphasis on egalitarianism in the Canadian Charter of Rights and in the Canadian legal and human rights culture at the moment, and there is an awareness that freedom of speech can often trample on the rights of certain groups.

In conclusion, I would like to emphasize again that even in a country as close to ours in legal and political culture as Canada is, there are points of view on free speech and on race and religion that differ from ours.

REMARKS BY VED NANDA*

I submit that the conflict between religious belief and free expression can create difficulties in every society. To illustrate, in Denver I wrote a popular piece suggesting that the Rushdie affair is one where even in Islamic nations there ought to have been tolerance, and that people who had not even read what Rushdie said ought not to pass judgment. A couple of good Muslim friends chided me and reminded me that in India and Pakistan sensibilities were offended and people were killed, and that such incidents ought to warn us to be very careful in how we express our feelings on these issues.

As our Chairman noted, the 1981 U.N. Declaration on the Elimination of Religious Intolerance and Discrimination is the latest pronouncement in this area. It is not a convention. It is simply a declaration, and there is dispute as to the authority of a declaration under international law.

Let me illustrate the difficulty in attempting to balance freedom of expression and the sensitivities of people. A person who worked in the religious discrimination and protection area for a long time, Krishnaswamy, was asked how he would balance these two interests, and what kinds of criteria he would use. He emphasized the impossibility of identifying legitimate restrictions in the abstract, but he also suggested that some manifestations of religion or belief can be, "so obviously contrary to morality, public order, or the general welfare that public authorities are always entitled to limit them, or even to prohibit them altogether."

The U.N. declaration raises questions about that murky area where there may be competing considerations of tolerance on one hand and discrimination on the other. Obviously a resolution of these issues will take many years, as it took almost two decades before the declaration became a reality. Similarly, it will take many years before there can be a convention on the subject. It is obvious that the enumeration of precise and appropriate criteria is difficult.

In the United States, where freedom of speech is a sacred right, there have been several attempts by the Supreme Court to provide a balancing test. We are usually reminded of *Dennis v. United States* where Justice Vinson indicated that it was not

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clear whether "degree" referred to clear and present danger, or to evil, and that perhaps both were meant.

The critical factor in the United States is whether the utterance tends to incite an immediate breach of peace. The substantial interest of the state must be examined. For example, for the application of the criminal libel theory in Illinois, the statute made it unlawful to publish or exhibit matter that portrayed depravity, criminality, unchastity, or lack of virtue of a class of citizens of any race, color, creed, or religion. The point of the statute was that such expression exposed its victims to contempt or derision.

There was a case from the United Kingdom before the European Commission of Human Rights concerning a person who wanted to have the right to publish his poem that was considered by some to be blasphemous. The law of blasphemy in England has a long tradition, and until the latter part of the 19th century, it consisted of any attack on the Christian church, or any contradiction of Christian doctrine. Then, about a hundred years ago, Lord Cauldric decided that people could speak against and vilify Christianity, "if the decencies of controversy were observed." Ten years ago the House of Lords said that blasphemy was limited to scurrilous or vilifying attacks on Christianity.

Later in England, a commission examined the issue and recommended that blasphemy be totally eradicated as a crime. However, as a result of public outrage, and especially because of the case before the European Commission of Human Rights, the recommendation was not carried out.

The European Commission of Human Rights referred to article 10(2) of the European Convention, which states that the right to freedom of expression guaranteed in article 10(1) may be subject to such restrictions or penalties as are prescribed by law and are necessary to a democratic society for the prevention of disorder or crime, for the protection of health or morals, and for the protection of the rights of others. After analyzing this particular case the Commission upheld the law on those grounds.

In India, the Salman Rushdie book was banned. I have followed the popular press in India to some extent through weekly journals and daily papers. This is a society where the tragedy of 1947, when millions of people became refugees, and hundreds of thousands, or by some accounts, more than a million died in communal violence, will not be soon forgotten. Even today in a place very close to Delhi, there is a mosque that Hindus claim was built after demolishing a sacred temple that was built in honor of Lord Rama, one of the incarnations of the Lord, according to Hindus.

This is the kind of issue on which peoples' emotions run high, and not simply between Hindus and Muslims (an issue that has continued to be of great concern to the Indian Government) but even among different Hindu sects. You can find hundreds of people willing to die for the protection or the honor of their religious beliefs, such as when a cow has been slaughtered, or a slaughtered pig has been thrown in a mosque. This is why in India Rushdie's book was banned.

It is interesting that in the Indian press there were many letters to the editor and articles stating that, being a pluralist secular society, India ought not enact statutes limiting freedom of expression. The majority of the writers, however, cautioned the government to be sensitive to the possible calamity that was threatened if the book was published in India. I would simply suggest to you that no matter how deeply we feel this need for freedom of expression, in many countries, including India, you have to draw the line more towards giving protection to and honoring the religious sensibilities of people.

REMARKS BY M. CHERIF BASSIOUNI*

Considering the breadth and depth of the issues as they pertain to Islamic law, in theory and practice, and the short period of time allotted to me, it is difficult to be anything more than cursory.

Islam is a holistic concept. To understand it, particularly with respect to the issues pertaining to blasphemy, involves epistemological, theological, philosophical, historical, legal, and even political considerations that must be examined in their totality, as well as contextually. Consequently, it is very difficult to reach any conclusions without having the background knowledge pertaining to all these areas. It must also be understood that the legal culture of Islam is the product of its evolution and its spread, throughout fifteen centuries, in cultures and civilizations as diverse as those of southern Spain and China. The common denominator of both the Koran and the Sunna as the two principal sources of the Sharià does, however, narrow the gap in the interpretation and application of the law which developed as a result of the above-mentioned cultural and historical diversity.

The Koran is the principal source of law and is interpreted by the sayings and the deeds of the Prophet during his lifetime and subsequently further interpreted by the jurisprudence of the four Sunni jurisconsults who established views followed by 90 percent of all Muslims. Ten percent follow the Shia's 12 different jurisprudential schools. Islamic law and social and political conceptions began to diversify after the Prophet's death in A.D. 632. Political conceptions of the Prophet's succession led to the division between the Shia and Sunni movements. The Shia movement's political conception had far-reaching jurisprudential implications. Their political conception was that the Khalifa, or the leader of the Muslim state, has to be a descendant of the Prophet. The jurisprudential implication that followed was that the Shia considered the Prophet's descendants to be more authoritative on interpreting the Sunna than anyone else. Thus, having found a way to limit the authoritative interpretation and sources of the Sunna, one of the two principal sources of Islamic law, the Shia were able to develop a system of political control over their followers. The Sunni instead adopted, over the span of a hundred years, four schools of jurisprudence which spawned a number of subschools in different areas of the Muslim nation.

Unlike the Shia, the Sunni believe that the Khalifa should be elected by the people and thus they have developed a more politically liberal system and a richer social diversity. For example, many liberal legal developments emerged in the second Abbasid period, during which the Islamic nation experienced the most contacts with other civilizations, particularly with India and the west. It was during that period that the Abu-Hanifa school, one of the four Sunni schools, developed more liberality in the field of criminal justice than the Maliki, Shafei, and Hanbali schools. The Hanbali school, which is followed in the Arabian peninsula and especially in Saudi Arabia, is the more rigid one. Urban life in Damascus and Baghdad was more comfortable than in the deserts of the Arabian Peninsula and the law, as interpreted and applied in these areas, reflected it. Later, under the Turkish Ottoman Empire, the Sharià became more secularized, and thus flexible rules of interpretation were developed with some codification in the Myalla. It was therefore important to keep in mind the basic fundamentals of what the Sharià is in light of its development throughout time and across the geographical spread of the Muslim nation.

This complexity and diversity explains, to a large extent, the contemporary fundamentalism in many Muslim countries. It is almost impossible for anyone who is not a

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scholar devoting a good portion of his life to the study of the Sharià's evolutionary development to understand it. And so a sort of retrenchment to the basic fundamentals of religion reflects a search for greater clarity and specificity and less complication. In my judgment, however, the diversity, breadth, and depth of the Sharià until the 11th century is what made Islamic society then strong and viable, as opposed to the current search for a narrower base of fundamentalism which provides for less flexibility and ultimately bears the seeds of a weaker society.

To try to compare the Sharià to Western positive law is virtually impossible because the Sharià reflects a holistic conception of life, government, law and hereafter. There is no division of church and state; there is no division between matters temporal and religious, and between different aspects of law. Nevertheless, it would be foolish to believe that all of these considerations do not have a significant influence on social realities.

The next point I would like to make concerns the relationship of Islam to other beliefs. Islam very clearly states that it is not a new religion; it is the religion of Abraham, Moses, Jesus, and the Prophets of the tribes, and it therefore encompasses Judaism and Christianity which are called the "Religions of the Book." There are specific duties and obligations for the observance and respect of these religions and protections of those religious practices. But there is also an exclusion of any other beliefs. So freedom of religion and freedom of the exercise of religion can be, though does not have to be, limited by a Muslim state to these three monotheistic faiths.

Apostasy and blasphemy are crimes under Islamic law. The Islamic criminal justice system divides crimes into three categories: the first category is Hudud crimes, which are seven crimes found in the Koran for which there are particular penalties provided for in the Koran and by the Sunna; the second category of crimes, called Qesas, are those against the person for which talion or victim's compensation is applicable; and the third category, Ta'àzir, is equivalent to statutory law. The principles of legality are provided for in the Koran and therefore, criminal law must be specific and unambiguous and penalties provided for. In the Ta'àzir crimes, however, most scholars agree that the principles of legality can be interpreted by analogy to similar types of crimes under Hudud and Qesas. Thus, Ta'àzir is a more elastic category.

Apostasy is clearly a Hudud crime, but blasphemy can be a Hudud or Ta'àzir crime. Apostasy applies only to Muslims. Blasphemy, as a Hudud crime, applies only to Muslims as well, but as a Ta'àzir crime, it also applies to non-Muslims.

You can therefore see the difficulty in trying to synopsise all of that in just a few minutes and to tell you the distinctions that arise with respect to these crimes, and with respect to their interpretations and applications. Let me, however, illustrate the problem with respect to apostasy, which occurs whenever a Muslim expressly renounces Islam. In the days of the Prophet, this did not mean only a change of heart about the faith but conduct which could be analogized to treason as understood in modern positive law. A Hadith of the Prophet illustrates the liberality of interpretation that prevailed. A person was brought to the Prophet accused of having committed the crime of apostasy, and the followers said "We must put the man to death." The Prophet asked, "What did he do?" The followers said, "We found him in the desert throwing his spear up in the sky saying, 'I want to kill God.'" The Prophet then asked the accused "Why do you want to kill God?" And the man said, "I had a loved one I was planning on marrying and she died—God took her away. So I'm mad at God and I want to kill him." And so the Prophet looked at his followers and said, "Is it not enough for you that he recognizes the existence of God in wanting to kill him?" And so the accused was found not guilty of apostasy. What that judgment

conveyed was the notion that apostasy was not to be interpreted in a rigid manner and that it was really the equivalent of treason when one acted against his nation because a change in religion at that time meant going over to an enemy's camp.

In a second Hadith of the Prophet, he said you cannot apply Hudud penalties, even though a person has been condemned, before giving the person an opportunity to repent and change his mind. The four Sunni schools thereafter differed on the interpretation of that ruling with respect to apostasy. The Maliki school, for example, says that a person convicted of apostasy can have 10 days to change his mind and repent. The Abu-Hanifa school says he will have 3 days. The divergence emboldened me to propose in a book I wrote a few years ago that if the debate is on the number of days, and not on the principle, then why not give the convicted person the rest of his life? And if that is the case, then who is the temporal judge who can decide if he has truly changed his mind internally or if it is merely an apparent change. If so, is the issue one of real or apparent change of heart? If it is only an apparent belief or change of heart, then the crime is of recanting the change of heart, predicated on form and not substance. What then is the real policy or purpose of the crime? So I conclude with the traditionalists that a person can be prosecuted for apostasy if he voluntarily and unequivocally renounces Islam while in a Muslim state, but then, and this is my view, whoever is found guilty should not be punished because the penalty should be suspended until such time as the person, in his own conscience, may decide to change his mind and recant his apostasy.

A problem exists in Muslim societies having Christian and Jewish minorities because in Islamic law, a male can exercise his right of unilateral divorce by repudiation. Thus, a Christian or a Jew in a Muslim society may convert to Islam only to secure such a divorce, and thereafter recant his conversion and revert to his original faith. This situation exists and creates social and religious problems that cannot be resolved through a rigid application of apostasy.

The next issue I would like to bring to your attention is whether or not a Muslim state can exercise criminal jurisdiction over a Muslim or a non-Muslim citizen accused of apostasy or blasphemy (keeping in mind the distinctions I made about these crimes) when the alleged crime was committed outside the Muslim state seeking to exercise its jurisdiction.

A historical conception existed, which was probably valid until the 16th century when some semblance of a unitary Islamic state existed, when for jurisdictional purposes, the world was divided between *dar el-Islam* (the World of Islam) and *dar el-harb* (that part of the world that is at war with the World of Islam). Since no unitary Islamic state and no state of war exists between Muslim and non-Muslim states, no Muslim state can now make such a claim about the division of the world. Thus, no Muslim state can exercise jurisdiction over a Muslim or a non-Muslim outside its territorial jurisdiction with some exceptions for their own citizens abroad. The Islamic Republic of Iran thus cannot claim jurisdiction over Salman Rushdie, irrespective of whether he committed apostasy or blasphemy in England or elsewhere outside Iran. But, assuming *arguendo* that such charges could be brought against Rushdie in Iran, he would have to receive a fair trial in accordance with the Sharià, including all the procedural safeguards available in Hudud crimes and the prosecution would have to establish proof of any alleged crime in accordance with rigorous Sharià requirements. None of that occurred before the "death sentence" that the late Ayatollah Khomeini meted out by fiat to Rushdie and which, in my opinion, is unqualifiedly illegal under Islamic law.