

Freedom of Religion and Freedom of Expression: Religiously Offensive Speech and International Human Rights

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Abstract

May the state prohibit speech that deeply offends religious sensibilities? This issue has recently been a matter of intense controversy in both the Islamic and Western world. Much of the discussion, on both sides, has been inflammatory and deeply unhelpful, even counterproductive. This paper seeks to advance the discussion by analyzing and defending the approach suggested by international human rights law.

Although international human rights law is explicitly silent on the question of speech that is intended to be or is perceived as hostile to a religion, there is a clear body of law dealing with speech that fosters racial discrimination that can be used as a model. On this basis, prohibiting speech that provokes or incites religious discrimination, religious hatred, or religious violence is clearly within the bounds of international human rights law. Prohibiting speech because that speech is offensive to adherents of a religion is not.

If speech is to be free, it must be regulated only to prevent demonstrable serious harm to others that outweighs the harm to those whose speech is restricted. Crying fire in a crowded theater is a classic example. Prohibiting speech that incites religious violence clearly meets this test. The fact that some people find the speech offensive clearly does not.

The human right to freedom of religion does not guarantee that others respect one's religion. States are obliged to permit the free choice and public exercise of one's religion and to protect that choice and exercise. States are at liberty to give support to religion, either in general or to particular religions – so long as that support does not violate the human rights of others. To prohibit some speech on the basis of the religious sensibilities of one, some, or all religions restricts a fundamental human right for a non-human rights reason of insufficient weight.

States are certainly free to discourage such disrespect. Doing so is quite possibly good public policy. States, individuals, and groups certainly are free to condemn such speech, organize protests and boycotts against such speakers and their supporters, and engage in the full range of protests and retaliations that do not utilize the coercive apparatus of the state. But states are not, according to international human rights law, entitled to prohibit speech on the grounds that it shows disrespect for or deeply offends the sensibilities of adherents of a particular religion, or of religion in general.

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The paper concludes by exploring avenues for conversation between those who accept the approach of contemporary international human rights law and those who reject it on the basis of their own religious beliefs.

Religiously offensive speech is an issue of considerable controversy, both internationally and in many religiously diverse countries. I address the topic in this paper from the perspective of international human rights norms. I show that the rights to freedom of expression, freedom of religion, and nondiscrimination do not provide protections against insensitive, insulting, or even blasphemous speech. To prohibit speech because it is disrespectful to one or more religions in effect imposes the particular religious views of some on others, thus denying not only freedom of expression but also freedom of belief or religion, and thus the basic equality, autonomy, and dignity of those whose speech is restricted.

1. International Human Rights Norms

Whatever our views on the philosophy of human rights, we live in a world where we have an extensive body of international human rights norms.¹ The 1948 Universal Declaration of Human Rights (UDHR) has been accepted as authoritative by virtually all states and the body of human rights treaty law has been unusually widely endorsed. The six core international human rights treaties (on civil and political rights, economic, social, and cultural rights, racial discrimination, women's rights, torture, and the rights of the child) had, as of July 14, 2006, an average of 166 parties,² which represents a truly impressive 85% ratification rate. I will initially take this body of legal norms as binding, although in §6 I do address the issue of incompatibility of human rights and other standards of evaluation.

Four instruments are of special importance for our topic: the Universal Declaration, the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of Racial Discrimination (ICERD), and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.³ Technically, the two treaties (ICCPR and ICERD) are binding only on the parties to the treaties (which in July numbered 156 and 170 states respectively) and the two declarations are not technically binding (except to the extent that they express customary international law). In practice, however, virtually all states treat provisions included in both the UDHR and the ICCPR as authoritative, barring explicit reservation or

1. The Rawlsian idea of an overlapping consensus is useful here: different groups coming to agreement on a particular set of political and legal norms from (and despite) profoundly different worldviews and comprehensive religious and moral doctrines. See (Rawls 1996: xliii-xlv, 11-15, 133-176, 385-396; 1999: 31-32, 172-173). For applications to contemporary understandings of human rights, see (Bielefeldt 2000), (Donnelly 2003: 40-41, 51-53), and (Peetush 2003).

2. Data available at <http://www.ohchr.org/english/bodies/docs/status.pdf>.

3. The texts of these instruments are available at <http://www.ohchr.org/english/law/>.

denunciation. In the case of both freedom of expression and freedom of religion, the provisions in the instruments present strong, clear, and coherent norms.

The basic provisions on freedom of religion are as follows.

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief,¹ 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. (UDHR, Article 18)

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. (ICCPR, Article 18.1)

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever 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. (Declaration on Religious Intolerance, Article 1.1)

As the Human Rights Committee put it in its General Comment No. 22, this right “is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others.” (emphasis added)

In addition to these guarantees, international human rights law explicitly prohibits discrimination on the basis of religion or belief. The Declaration on Religious Intolerance is especially clear: “No one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or other belief.” (Article 2.1) Article 2 of both the Universal Declaration and the ICCPR explicitly list religion as a prohibited basis for discrimination.² In other words, in addition to the primarily negative obligation to tolerate diverse beliefs and their public expression, states stand under powerful positive duties to protect all individuals from discrimination based on religion in the enjoyment of their other internationally recognized human rights. They must act to

1. The provision was a principal reason that Saudi Arabia abstained on the Universal Declaration. More generally, a number of Muslim states have rejected this provision with respect to Muslims renouncing their faith. I am aware, however, of no other countries that have objected to other provisions. And none of the parties to the ICCPR have expressed significant substantive reservations to Article 18.

2. Religious intolerance is also specially singled out as a problem of global importance in the Vienna Declaration and Programme of Action (Part I, par. 30, Part II, par. 22). <http://www.ohchr.org/english/law/vienna.htm>.

assure that the equal enjoyment of all human rights is not infringed because of one's religion.

The basic provisions on freedom of expression are as follows.

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. (Universal Declaration, Article 19)

Everyone shall have the right to hold opinions without interference. 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. (ICCPR, Article 19.2)

Freedom of expression, similar to freedom of religion, is embedded in a broader context; in this case, freedom of opinion. In fact, given the strong link between the notions of "thought" and "opinion," freedom of expression and freedom of religion are more like two sides of the same coin than fundamentally different rights. They jointly protect an internal domain of individual autonomy and equality from coercive interference in the full range of one's beliefs and opinions.

2. Restrictions on Freedom of Expression

International human rights law allows no restrictions on freedom of religion or belief. It does, however, permit certain limitations on freedom of expression. The underlying idea would seem to be that religious or comparable beliefs are of such importance that no restrictions can be permitted. Some other opinions, however, may, in limited circumstances, be appropriately restricted.

Article 19.3 of the ICCPR indicates that freedom of expression may "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 also requires that "Any propaganda for war shall be prohibited by law. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

Article 4 of the ICERD even requires criminalization of "all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts." Although technically these provisions apply only to "race," the strong link between racial discrimination and religious intolerance in the general body of international human rights norms suggests that the broader formulation of the ICERD can be considered to apply to religious discrimination as well. This is particularly true since World Conference Against Racism, Racial

Discrimination, Xenophobia, and Related Intolerance.¹

We can thus distinguish the relatively narrow approach of the ICCPR and the somewhat broader approach of the ICERD. Both prohibit incitement to discrimination or violence are quite unproblematic. These restrictions are relatively uncontroversial.² The underlying idea is that incitement to prohibited acts is itself legitimately prohibited, in this case, acts that violate the rights to personal security and nondiscrimination.

More controversial is the additional prohibition in the ICERD of advocacy or even mere dissemination of ideas of racial (and by extension religious) hatred or superiority. The underlying idea here would seem to be that such expressions contribute indirectly to violence or discrimination and thus are sufficiently close to incitement to be prohibited. Although a large number of states have entered various reservations with respect to the provisions of Article 4,³ in this paper I will adopt the broad approach of the ICERD and take advocacy of religious hatred or superiority as prohibited by international human rights law.⁴

As the Human Rights Committee has noted in its General Comment No. 10, however, “when a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself.” This generally accepted principle of interpretation – no exception can be allowed to undermine the overarching principle – deserves special emphasis.

Like all human rights, the right of freedom of expression removes speech from the ordinary process of democratic (or other authoritative) decision making. Article 19, as we saw, permits restrictions only when necessary to protect the rights or reputation of others, national security, public order, or public health or morals. Only restrictions based on these grounds are permissible. And those restrictions must be necessary, not merely consistent with or conducive to the realization of those purposes.

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1. The Report of the Conference (A/CONF.189/12) is available at <http://daccessdds.un.org/doc/ UNDOC/GEN/N02/215/43/PDF/N0221543.pdf?OpenElement>. This broader orientation, however, goes back at least to 1994 when the UN Commission on Human Rights created a Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, with a mandate “to examine in accordance with his mandate incidents of contemporary forms of racism, racial discrimination, any form of discrimination against Blacks, Arabs and Muslims, xenophobia, negrophobia, anti-Semitism and related intolerance.” (Resolution 1994/64) For the work of the Special Rapporteur, see <http://www.ohchr.org/english/issues/racism/rapporteur/>.
 2. The United States is the principal exception that proves the rule, generally prohibiting incitement to violence but not incitement to discrimination.
 3. See <http://www.ohchr.org/english/countries/ratification/2.htm>.
 4. Personally, I disagree with this position. But nothing in my argument requires the narrow view of limitations on freedom of expression, and thus I adopt the wider view, in order to increase the range of applicability of my argument.

3. Religiously Disrespectful Expression

We now come to the particular problem that is the heart of this paper, namely, expression that is offensive or disrespectful to one or more religions.¹ This issue came to the forefront of international attention last year after twelve cartoons depicting the Prophet Mohammed were in a Danish daily newspaper. The problem, however, has arisen in a number of cases in many countries over many years. For example, in my country, the United States, there was a major controversy in 1989 over the public display of a photograph of a plastic crucifix suspended in a glass vial of the artist's urine. And in March 2007 Catholic protestors in New York stopped the exhibition of a sculpture of Christ fashioned of chocolate.

In most such instances, it is the particular substance of the expression that is challenged. From an international human rights perspective, this is particularly troubling. By targeting the content of the speech, demands for censorship or punishment imply a *prima facie* infringement of the right to freedom of expression. And the provisions of Article 19 of the ICCPR that permit restrictions on expression when necessary to protect public morals or public order do not apply.

If the offensive expression incited discrimination or violence, they might plausibly be interpreted as threatening public order – although a stronger appeal would be to protecting the human rights of others. But any threat to public order in such cases comes from the intolerance of protestors to protected speech, and those who politically manipulate them.

If A reacts violently to B's statements – assuming that those statements are otherwise legally permitted – it is A, not B, who threatens public order. Were one to blame B, the limits on expression would be set by fanatics expressing particular substantive views. For example, under the alternative view, if white supremacists rioted in response to claims of racial equality, speech advocating racial equality would be appropriately banned as a threat to public order. Clearly this would be perverse.

Speech that merely offends others is completely protected. This is the only way that the equal dignity of all individuals can be protected. To grant to A the effective right to determine the limits of B's speech, simply because A finds it offensive, is a clear *prima facie* violation of freedom of expression – no matter how large a group is represented by A, and even if B is a solitary individual.

Arguments based on public morals will not work in this case either. As the Human Rights Committee notes in its General Comment No. 22, “the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to

1. For reasons of simplicity, here I will assume that those engaging in the speech or other expression are to a significant extent aware that the expression is (likely to be) considered offensive by some group that can reasonably be expected to encounter the expression.

manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition.” This holds even in the case of a dominant religious or moral tradition within a particular country.

Restricting the expression of opinions on the basis of their incompatibility with the substantive views of any particular group (or particular set of groups) is an impermissible denial of equality and autonomy. Only those who happen to agree with particular substantive views are entitled to freedom of expression – which simply is not freedom of expression in any plausible sense of that term. In other words, the “exception” actually fatally undermines the right and thus cannot be permitted.

Contrast this with restrictions on pornography, which exist in some form in almost all countries. The fact that almost all countries restrict some graphic sexual depictions (especially those involving children) indicates that a broad conception of public morals is at work. Furthermore, in virtually every country, a wide range of moral and religious traditions condemn at least some graphic sexual depictions. This is in sharp contrast to expression that is only offensive to a particular moral or religious tradition – as in this case.

Public morals means precisely that, the morals of the public independent of particular substantive religious or moral views. Any one group, even if it makes up the vast majority of the population, cannot impose its particular moral views on others. That is the essence of the idea of freedom of expression, as well as freedom of religion, and many other internationally recognized human rights.

4. Free Speech and Religious Liberty

We still have one more possible ground for restricting religiously insensitive speech, namely, to protect the rights of others. This is, in principle, the strongest argument that can be made. It does not appeal to some other value outside the framework of human rights (e.g. national security or public morals) but to conflicts between rights. It involves restricting expression is that it not merely offensive to others but harms them by violating their human rights.¹

It is important to recognize that not only do human rights regularly conflict with one another, but every human rights potentially conflicts with at least one other human rights, and most often many others. Human rights may be paramount moral and legal rights. But no human right is absolute. Balancing competing rights is an inescapable part of the law and politics of human rights, both nationally and internationally.²

1. I have already suggested that this is what underlies the violence and incitement exceptions.

2. For brief arguments defending certain forms of the prohibition of apostasy among

Our question here is whether religiously offensive speech raises issues that require a balancing of competing human rights. I will argue that it does not.

The right to freedom of thought, conscience, and religion protects every individual in her choice of belief. No less importantly, the right to non-discrimination protects everyone in the enjoyment of all their other human rights irrespective of their religion. Religiously offensive speech that does not incite violence or discrimination, however, infringes neither of these rights. It neither restricts the choice of religion or belief nor restricts the enjoyment of other human rights by adherents of a particular religion.

What about the broader limitations on expressions of religious hatred or superiority? Recall the general principle that limitations be interpreted narrowly. This is particularly important here because the threat to the rights of others posed by intolerant speech that does not incite violence or discrimination is indirect and relatively obscure. Therefore, we must insist on a strict construction of “hatred” and “superiority.”¹ The simple fact is that much religiously offensive expression fails to meet any such test.

There simply is no internationally recognized human right to be protected against cretins and boors, or even highly sophisticated but intentionally offensive people, no matter how offensive they may be. B’s opinions and beliefs are hers – and to be protected and valued as expressions of her personal dignity, autonomy, and equality – no matter how offensive they are to A (as long as they do not clearly trigger one of the exceptions noted above). That is the whole point of the rights to freedom of opinion, belief, expression, and religion.

In fact, to allow A to prohibit B’s expression simply on the grounds of (offense to) A’s religion would amount to a violation of B’s freedom of religion. B’s expression would be required to conform, at least in this particular dimension, to A’s religious beliefs, irrespective of the beliefs of B. This is the effective imposition of certain religious beliefs of A on B. In other words, we can reject prohibitions of such merely offensive expressions entirely on the basis of the right to freedom of religion and belief, without the additional support provided by the right to freedom of expression.

Muslims, and the American practice of not prohibiting hate speech, see (Donnelly forthcoming).

1. I would further suggest that we focus on hatred rather than superiority. Many religions consider themselves to be superior to others. This is true, for example, of Christianity and Islam. Certainly we do not want to back ourselves into a position where, for example, claims that x is the one true religion are prohibited. Expressions of superiority not connected to hatred seem relatively unproblematic; or, conversely, only hateful expressions of superiority merit restriction.

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