

René Cassin Essay Competition 2015 – winner

Competition judge Daniel Finkelstein of *The Times* comments: “... an extremely original and enjoyable approach and made sure not to dodge the difficulties of the topic. I thought it was very subtle and got to the heart of the matter.”

Human Rights and Religion: Compatible or Conflicting?

Michael Rhimes

Student: Do human rights and religion conflict?

Master: Yes, doubtlessly.

Student: But ... how can you say that? Isn't there a human right to manifest one's beliefs¹? Don't they all stem from the inherent dignity of every human²; aren't they reconciled in this common source³?

Master: That is simplistic. Within the tapestry of human dignity are threads of rights that, from afar, seem to gracefully intertwine. But on closer inspection they pull in different directions⁴. If we are intellectually honest we would openly recognise the inherent tension between the practical adherence to a system of belief, on the one hand, and the rights of others and broader social interests, on the other.

Student: So they do conflict... but it's not a bad thing.

¹ European Convention on Human Rights 1950 (“ECHR”) Art 9;
American Convention on Human Rights 1969 (“ACHR”) Art 12;
Universal Declaration on Human Rights 1948 (“UNDR”) Art 18;
African Convention on Human and People's Rights 2005 (“ACHPR”) Art 8
International Covenant on Civil and Political Rights 1966 (“ICCPR”) Art 18

² See: UNDR Preamble, “inherent dignity” of “all members of the human family.”; ACHR Preamble “the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the *human personality*”; ACHPR Preamble “fundamental human rights stem from the *attitudes of human beings*, which justifies their international protection and [...] the reality and respect of peoples' rights should necessarily guarantee human rights”

³ Sepúlveda *et al*, *Human Rights Reference Handbook* (Ciudad Colon, Costa Rica, 2004); M. Perry, *The Idea of Human Rights* (OUP, 1998), 46; J. Griffin, *On Human Rights* (Oxford, OUP, 2008), 10

⁴ *Tariq v Home Office* [2011] UKSC 35, [71]

Master: Correct.

Student: What about absolute rights, like the freedom of conscience? Surely even if they do conflict with other interests, it trumps them. When could I ever be forced not to believe something?

Master: Good point. In theory, I can believe in what ever I want. But that's not the end of the matter. How far can I require society to protect the means of fulfilling that belief? How far can I impose my vision of free beliefs on others?

Student: I don't understand

Master: Let me give an example. Take the Jehovah's Witness case, *Gldani*⁵. They argued the state had breached their right to manifest their religion when they failed to prosecute their assailants. They had video records identifying the perpetrators, but the state did nothing.

Student: Surely you cannot suggest the state stand idly by?

Master: No. Of course not. But what if there was no video evidence, and the state determined that it was unlikely that a prosecution would be successful, or that the financial cost would outweigh any prospects of success? Would that be a violation of their right?

Student: I don't know... There are clearly other rights at stake...

Master: What if the Jehovah's Witnesses were organising a rally against blood donation and the state refused to give permission to hold that demonstration? What about if, even more remotely, the state refused to provide police support to protect them during that demonstration?

Student: Well are they just separate issues? There is a right to assembly, and that could cover the demonstration⁶. There's also the right to bodily integrity.⁷ These could impose a positive obligation on the state to take reasonable precautions to safeguard the protesters⁸.

Master: True. But you are dodging the question. The question is whether human rights and religion are compatible. You said they are because they stem from a core commitment to human values. But when tested, you openly accept that the position is not so simple. There are conflicting considerations with which a right to manifest one's beliefs necessarily conflicts. Of course other rights are relevant; but it does not negate the essence of the tension.

⁵ *Gldani Congregation of Jehova's Witnesses v Georgia* (2008) 46 E.H.R.R. 30

⁶ ACHR Art 15; UNDR Art 20; ECHR Art 11; ACHPR Art 10

⁷ ACHR Arts 4, 5 and 7; UNDR Art 3; ECHR Arts 2 and 8; ACHPR Art 4.

⁸ *Plattform "Artze fur das Leben" v Austria* (1991) 13 EHRR 204, (freedom of assembly includes the right to protection against harmful counter-demonstrations); *Nurretin Aldemir v Turkey*, App. No. 32124/02, 18 December 2007, [41]

Student: But you are just saying that we don't know in advance how far the right to manifest one's religion extends. Maybe there is an uncertain fringe. That is why states are afforded margins of discretion⁹, or why the courts will not subject to rigorous scrutiny the Secretary of State's determination that Dr Naik's religious extremism would be prejudicial to national interests.¹⁰ But there is still a core, and how is it inconsistent with human rights?

Master: So what is that core? As soon as your beliefs are translated from thought processes into real actions they interact with the rights of others. You don't think God cares about his creations? Fine. Then write it. But in so doing you open yourself up, in some countries, to blasphemy¹¹; in others, physical punishment¹². You want to pray? Fine. Then pray. But what does that tell me about the state's obligation to provide and secure places of prayer¹³, or offer fiscal and other social advantages to them¹⁴? You want to follow a religious life? Fine. Then follow it. But how far does that require prisons to let you grow a beard¹⁵, or respect your dietary requirements¹⁶? How far does that prevent the State from regulating religious schools' administration of corporal punishment¹⁷, or employers from imposing corporate uniforms¹⁸?

Student: I understand. But I still don't see how a commitment to a certain view of the world, religion, is necessarily inconsistent with the idea that humans have rights that the state is required to fulfil and protect¹⁹. Can't we have both?

Master: Of course we could. In theory there is nothing mutually exclusive about the two. But in practice your conception of rights is without meaning. The adherence to a system of belief will, at some point, translate into viewpoints, traditions and actions that bisect the rights and interests of others.

⁹ M. Lugato, "The "Margin Of Appreciation" And Freedom Of Religion: Between Treaty Interpretation And Subsidiarity" (2013) *Journal Of Catholic Legal Studies* 49; *Schalk and Kopf v Austria* [2011] 2 F.C.R. 650 [53]

¹⁰ *R(Naik) v SSHD* [2011] EWCA Civ 1546; see also *R(Berriew) v SSHD* [2014] UKSC 60.

¹¹ Austria, Strafgesetzbuch §188; Denmark, Sraffeloven §140; Germany Strafgesetzbuch §166

¹² Iranian Penal Code §513 " Anyone who insults the sacred values of Islam or any of the Great Prophets [...] shall be executed; otherwise, they shall be sentenced to one to five years' imprisonment.";

Pakistani Penal Code § 295-C "Use of derogatory remarks, etc., in respect of the Holy Prophet: Whoever by words, either spoken or written, or by visible representation or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (peace be upon him) shall be punished with death, or imprisonment for life, and shall also be liable to fine."

¹³ *Karaahmed v Bulgaria* (ECtHR, 24. February 2015)

¹⁴ *Gallagher (Valuation Officer) v. Church of Jesus Christ of Latter-day Saints* [2008] UKHL 56; *Church of Jesus Christ of Latter-day Saints v. Henning* [1964] AC 420; *Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfi v Turquie* (ECtHR 02/12/2014) (App no 32093/10)

¹⁵ *Holt v Hobbs Director of Arkansas Department of Correction* 574 U. S. (2015)

¹⁶ *Vartic v. Romania*, (ECHR, Dec.17, 2013)

¹⁷ *R(Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15

¹⁸ *Eweida v United Kingdom* (2013) 57 EHRR 8

¹⁹ Ronald Dworkin, *Religion Without a God*, (2013 Harvard University Press), 1 "Religion is a deep, distinct, and comprehensible worldview"

Student: So even if I have an absolute right to believe what I want, this does not really mean much. If this entitlement is to be meaningful, it will necessarily have to be reconciled with other interests.

Master: Yes. You are starting to understand.

Student: Is religion bad then?

Master: Student, that question is beneath you. Free speech is a good. But it raises competing claims like privacy²⁰, social order²¹ and decency²². That does not make it bad, does it?

Student: Okay, I see. Well, I accept the tension point. But isn't this readily accepted in the content of the right itself? That right is clearly a qualified one. How does your position get us any closer to the truth?

Master: Because once we turn our backs on a view that the right to religious freedom is a right to anything that falls within the sphere of "belief", we are in a better position to answer the more meaningful question of what should fall within that sphere.

Student: But that is what I just said. It is a qualified right.

Master: Not quite. You seem to think there is a boundless abstract entitlement to anything that is proximate to religion, but that countervailing interests can limit this right on the anvil of hard cases. I am saying that a more intellectually honest approach would recognise that religious freedoms, even in abstract, are not unlimited titles. Rather than engaging with a piece-meal balancing process in individual cases, why not recognise that the very content of the right to manifest one's religion is circumscribed.

Student: So that actually gives us a more meaningful understanding of what the right to religion is in the first place, rather than leaving it to the outcome of a balancing process on the facts of a case.

Master: Yes. In a pluralistic and tolerant society, we must stand for the right to manifest one's religion. But we must also stand for the other rights in which our common core of humanity finds expression. We owe ourselves a clearer picture of the interaction of these two positions.

Student: Doctrinally, I could see why this is important. But how does that help in practice? Can't the courts just determine on the facts of a case how far the right to religion stretches?

²⁰ e.g. *Campbell v MGN* [2004] 2 A.C. 457 (Naomi Campbell and her right to privacy against MGN's interest in publishing stories contradicting her averments she did not take illicit drugs)

²¹ e.g. *Abdul v DPP* [2011] EWHC 247 (hate speech and incitement to violence)

²² e.g. *R v Gibson* [1990] 2 Q.B. 619 (frozen earing fetuses as art)

Master: Are courts the only bodies that have to consider the competing interests of religious expression and the various countervailing factors it engages?

Student: Who else would?

Master: Think. The Chief Constable who has to decide whether to allow a demonstration²³; the University that is pressured to offer a prayer room for its Muslim population²⁴; the B&B owners who argue that their right to manifest their religious belief extends to a right to discriminate in the provision of economic services²⁵; or, less drastically, the driving registration services who need to know whether colanders fall within the ambit of religious headgear²⁶. They all have to make a difficult determination of where the interests lie.

Ultimately, it trivialises the matter to treat it as one solely of law. Courts and lawyers in horse-hair wigs are not the sole guardians of the tapestry of rights I referred to earlier. Its warp and weft are the concern of all.

It is late. What have you learned?

Student: It is a bit more complex than I thought.

Master: Try again.

Student: Rights may share a common source, but their practical application requires us to recognise the tension between them. Finding that meaningful core isn't easy, but we will not get any closer by pretending that all rights and all interests sing in unison.

Master: Exactly. And this is not a cynical renunciation of rights. It is rather a recognition of the healthy dilemma that lies at the heart of rights-based discourse: rights clash and we must resolve this tension. In so doing, we avoid committing ourselves to aspirational but ultimately meaningless and self-referential slogans of "religious freedom". We embrace the awkward reality that giving practical effect to rights requires us to accept they do not all point in one direction. We owe ourselves no less.

Student: Thank you.

²³ *Abdul v DPP* [2011] EWHC 247; *Baczowski v Poland* (2009) 48 EHRR 19; *R(Laporte) v Chief Constable of Gloucestershire* (2006) 2 AC 105

²⁴ <http://www.independent.co.uk/student/news/muslim-students-pray-in-the-rain-after-queen-mary-university-denies-them-access-to-facilities-8918293.html> Chloe Cornish 01/11/2013

²⁵ *Eadie and Thomas v Riverbend Bed and Breakfast (No 2)* 2012 BCHRT 247; *Black v Wilkinson* [2013] 1 WLR 2490; *Bull v Hall* [2013] 1 WLR 3741

²⁶ <http://www.dailymail.co.uk/news/article-2747880/Pastafarian-allowed-wear-spaghetti-strainer-head-driving-licence-photo-classed-religious-headgear.html>, Jill Reilley (08/09/2014)

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