

## The Multi-Dimensional Nature of Religion

Alan Brownstein  
University of California, Davis  
School of Law  
United States

International law struggles with perceived conflicts between religious liberty and other constitutional values and principles that are fundamental to a democratic system. Religious practices may clash with principles of gender equality. *Leyla Sahin v. Turkey* [GC], no. 44774/98 ECHR 2005-XI. The protection of religious beliefs may justify restrictions on freedom of expression. *Otto-Preminger-Institut v. Austria*, 20 September 1994, Series A) no. 295-A; *Wingrove v. the United Kingdom*, 25 November 1996, *Reports of Judgments and Decisions* 1996-V.

Less attention is directed at the internal contradictions within a legal framework that strives to protect religious belief and practice against burdensome regulation and discriminatory treatment. Yet the same conflicts that are alleged to exist between religious liberty and external rights of equality and speech exist within any constitutional framework designed to protect religion against state interference and control.

At a minimum religion subsumes at least three fundamental, and sometimes conflicting, constitutional values that typically receive independent recognition and protection in a democratic system: personal autonomy and liberty, freedom of speech, and equality. Obviously, religious freedom protects personal liberty – the ability to practice one’s faith free from governmental interference. This value is essentially a dignitary interest. It is grounded on a basic commitment to the autonomy rights of individuals to make important self-defining decisions that are crucial to the development of their identities. Other liberty rights that reflect a similar commitment to personal autonomy include rights related to intimate association, marriage, and reproductive freedom.

Religious freedom also implicates freedom of speech. There is a speech dimension to many religious activities including sermons, prayer, proselytizing, and the publishing of books and periodicals. As an independent source of moral values, religion clearly plays a role in the marketplace of ideas. While freedom of speech serves important dignitary and autonomy values, it is primarily protected to further instrumental goals. Freedom of speech is the foundation of democratic self government because the right to vote lacks utility and legitimacy if the electorate is not free to publish and obtain information related to public policy issues and to debate those issues free from sanction. The most serious abridgments of freedom of speech involve viewpoint discriminatory laws through which the government distorts debate and manipulates electoral and policy-related outcomes.

Finally, there is an important equality dimension to the protection provided to religion. Religion does more than describe the beliefs of individuals; it defines the identity of groups and communities. Discrimination against classes defined by religious affiliation is problematic for many of the same reasons that discrimination against classes defined by race, ethnicity, gender, and sexual orientation is constitutionally troubling. Constitutional norms are often violated when majoritarian groups oppress historically victimized and vulnerable minorities or exclude them from the public life and benefits of society.

The multi-faceted nature of religion substantially complicates its protection under any constitutional regime which tries to respect each of the aforementioned values. While personal autonomy, freedom of speech and equality values sometimes overlap each other, they are also often in tension. For example, there is no mandatory equality requirement among autonomy interests. State recognition of certain kinds of autonomy interests, but not others, may constitute unequal treatment in some abstract sense, but does not raise constitutional concerns. Thus, the fact that the state protects one aspect of personal autonomy, such as the right to practice one's religion, does not require it to protect other important autonomy interests, such as the right to pursue one's trade or vocation, to the same extent. Accordingly, accommodations of religious exercise, including exemptions from neutral laws of general applicability, do not have to be provided to secular individuals whose ability to pursue their personal preferences are similarly burdened by government regulations.

Freedom of speech, by contrast, does mandate formal equality by requiring government neutrality among the subjects and viewpoints of expression. Here, any attempt to exempt religious expressive activities from general regulations without providing parallel exemptions for secular speech will raise serious constitutional questions. A law exempting a religious revival meeting from a general law banning expressive activities after 9:00 pm in a residential park would be challenged in the United States on the grounds that it unconstitutionally favors religious speech.

The tension between these competing constitutional frameworks – one grounded in autonomy and the other protecting freedom of speech – is not easily resolved. Of course, many religious practices, such as those that relate to the preparation and consumption of food and alcohol, are essentially non-expressive in nature. Exempting these practices from general laws creates no conflict with free speech requirements. But much of what constitutes the exercise of religion has a substantial speech dimension, and is protected as speech against discriminatory treatment under United States constitutional law. *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). When these religious expressive activities are recognized and protected as speech for constitutional purposes, religious accommodations and exemptions do not appear to be protecting religious autonomy in the name of human dignity. Instead, they are likely to be perceived as the privileging of religious viewpoints – a preference that clashes sharply with the instrumental goal of preventing government action that distorts the marketplace of ideas.

Another example illustrates the potential conflict between individual and associational autonomy and religious equality. It is common in many countries for state subsidized social

services and educational programs to be organized, and provided to beneficiaries, through the auspices of religious institutions. These arrangements further religious autonomy in various ways. Beneficiaries may believe that having such services provided in a religious environment is essential to their ability to live, and raise their children, according to the dictates of their faith. Moreover, religious institutions may assert a claim to collective autonomy in operating programs in a way that is consistent with their faith.

The fragmentation of social and educational services along religious lines may impose serious inequality costs on the members of minority faiths, however. In some locations, the most convenient or highest quality services may be provided in a pervasive religious environment that runs counter to minority beliefs. Further, if religious institutions are permitted to discriminate on the basis of religion in hiring employees to staff publicly subsidized programs, religious minorities may be ineligible for a significant percentage of state funded job opportunities in the social service and educational areas. In the latter case, no one would doubt that there is a real, material cost to the members of a racial minority in having social and educational services fragmented along racial lines in a way that denied them the opportunity to seek employment in programs operated under the auspices of the majority race. Similar costs and burdens are intrinsic to the fragmentation of services along religious lines.

An understanding of the multiple and diverse values that underlay a constitutional system committed to the protection of religious liberty and equality may be helpful in analyzing tensions between religion and external free speech and equality values. For example, one of the reasons that it is so difficult to justify restrictions on third party speech that offends the sensibilities of religious communities is that religious individuals and institutions are also speakers in the market place of ideas. If religious actors seek to have their expressive activities protected as speech for constitutional purposes when their words are employed as a sword to condemn others to damnation or as abominations, their free speech claims create considerable dissonance with the argument that religious communities should be shielded from insult and indignity by state restrictions on the speech of others. The judicial function of balancing the harm caused to group sensibilities by deliberately hurtful speech against the free speech rights of the speaker is a difficult task in most circumstances. It becomes even more complicated, however, when the victimized groups assert conflicting values: the right to peacefully exercise their autonomy in dignity and the right to aggressively assert their beliefs by challenging the identity and conduct of others in the cultural and political arena.