



Wiesław Waławczyk

Freedom of Speech and Other Human Rights

**A Selection of Documents with
an Introduction and Study Questions**

Wydawnictwo Naukowe
Uniwersytetu Mikołaja Kopernika

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Preface

This modest book aims at introducing readers to the issue of human rights seen from the perspective of one of them: freedom of speech. Its goal is then, first and foremost, didactic, with students being the main addressees.

As the title suggests, the text is made up of a selection of human rights documents and study questions, preceded by an introduction. In Part I, the documents under consideration include the Universal Declaration of Human Rights and excerpts from the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union, and the Constitution of the Republic of Poland of 2nd April 1997. Each of the mentioned catalogues is accompanied by ten study questions.

Part II includes selected opinions of the European Court of Human Rights, taken on the basis of Article 10 of the European Convention on Human Rights. Each of the provided opinions is preceded with a short outline of the factual circumstances of the given case. Also this part contains study questions.

The text continues a series of books on freedom of speech by the same author, published by the Nicolaus Copernicus University Press. Apart from this volume, it includes two other books: *From Milton to Mill: Classic Defenders of Freedom of Speech* (2012) and *Free Speech Defenders in Twentieth Century United States* (2013).

Wiesław Wacławczyk
Warsaw, 23 September 2014

Introduction: Freedom of Expression amongst Other Human Rights

In human rights catalogues, freedom of speech appears amongst other civil liberties, such as the right to life, freedom from slavery, freedom from torture, the right to a fair trial, the right to privacy, freedom of movement, freedom of religion, freedom of assembly and association, the prohibition of discrimination. Although it is difficult to exactly determine the number of all civil liberties, there is little doubt that the freedom under consideration belongs to the most important of them.

It results from the fact that it is both a substantive and procedural right. Being a value in itself, freedom of speech remains at the same time a means of protecting other values, including all human rights. In international human rights catalogues and national constitutions, the mentioned civil liberties, often called civil and political rights or the first generation rights, are followed by rights that are referred to as the second and third generation rights or, respectively, “economic, social and cultural rights” and “collective rights”. The former include, amongst others, the right to work, the right to education, the right to medical care, the right to participate in cultural life; the latter involve for example the right to peace, the right to a healthy environment, the right to development.

As “collective” rights, the third generation rights differ from those belonging to the two first generations in that they do not pertain to relations between individuals and state authorities. In their turn, the first two generation rights differ from one another, too. Civil and political rights are mostly negative rights, the so-called “freedoms from”, which protect individuals against interference by

state authorities or other official actors of public life. By contrast, economic, social and cultural rights are as a rule positive rights, the “rights to”, which require that the authorities take active steps in order to secure the protection of these rights.

As already mentioned, freedom of speech may be perceived as a means of defence of all human rights. After all, it entails freedom of the media, as its corollary. Free media, in its turn, may control, at least to a certain extent, the government’s actions – thus contributing to human rights protection. In reality, however, the relations between freedom of speech and other human rights are not that simple. The right to express one’s thoughts freely can easily challenge many values, including those enshrined in human rights conventions, charters or covenants. Let us now briefly examine some possible conflicts between freedom of expression and other human rights.

Freedom of speech and freedom of religion

In the First Amendment to the United States Constitution, freedom of speech appears alongside freedom of the media, freedom of assembly, freedom of association, the right to petition, and freedom of religion. All the rights contained in this provision have a lot in common. Historically, the first four served people as a means of defence of the fifth, which, for the rest, comes first in the discussed amendment. In order to freely choose and confess a certain faith, individuals associated in groups gathered at a certain place, petitioned the government to secure their right to exercise their religion or demanded from the authorities that this right should be protected. To achieve their goals, they often used media: leaflets, brochures, books, newspapers, journals, etc. Thus, the four mentioned rights have been a weapon in the struggle for freedom of religion.

However, these very same rights may also be used to the opposite end: they can become a means of attacking certain faiths or religious symbols. When in 2005 the Danish newspaper *Jyllands-Posten* placed a number of cartoons depicting Muhammad, Moslems in many countries went to the streets and protested against this sacrilege. The reason for this was not only the fact that Islam bans showing any images of the Prophet. The caricatures published by *Jyllands-Posten* were obviously provocative, for they portrayed Muhammad as, for example, a terrorist suicider who wears a bomb in his turban. The message sent by the Danish newspaper (and other Western newspapers, which later reprinted the cartoons shown in *Jyllands-Posten*) may be interpreted in various ways; one of these interpretations is the idea that matters referring to faith and conscience should not be an issue in politics (suicide bombers are believed to be motivated by religious factors). In the West, such provocative attacks on religion have legal protection, in other cultures they are often seen as abusive and unacceptable.

However, the tensions between freedom of expression and freedom of conscience mark their presence also in the Western world. The jurisprudence of the European Court of Human Rights (ECtHR) provides a number of cases in which these two values clashed with one another. In *Otto-Preminger-Institut v. Austria* (1994), the ECtHR ruled that the Austrian authorities did not violate Article 10 of the European Convention on Human Rights – ECHR (which is the legal basis for deciding cases concerning freedom of speech) when they seized and forfeited a film that offended the Catholic faith and obviously hurt religious feelings of the residents of Tirol, with its large majority of Catholics. In the film under discussion, God the Father was depicted as an old, senile and clumsy man; Jesus Christ as a mentally retarded person and the Holy Mary as a wanton woman. By presenting the central figures of the Catholic faith in such a way, the film producers were sure to offend many people in Austria. Therefore, the ECtHR stressed

that any kind of expressions pertaining to religion and morals cannot be protected as strongly as political speech. In the latter case the freedom to hold and impart opinions is almost absolute, which means that state authorities have very limited possibilities of interfering with the free exercise of this freedom. By contrast, in the former case the authorities have a wider “margin of appreciation”. It is understandable, the ECtHR notes, considering the fact that the Old Continent has many religions and no uniform conception of morality. Under these circumstances, it is incumbent on the European states – and not on the European Court of Human Rights in Strasbourg – to decide in specific cases what is and what is not a violation of the right to freedom of conscience.

Apart from the *Otto-Preminger-Institut v. Austria*, there have been other cases viewed by the ECtHR in which freedom of expression and freedom of religion collided. The case of *Müller and others v. Switzerland* (1988) concerned the exhibition of paintings that were confiscated by the Swiss authorities in order to protect health morals. The pictures presented sexual relations between men and between men and animals. The ECtHR ruled that there was no violation of Article 10, as the authorities had the right to protect morals. Also in this case the Court invoked the “margin of appreciation” doctrine.

In *Wingrove v. the United Kingdom* (1996), this doctrine was applied again. The case regarded a short video film entitled “Visions of Ecstasy”, the content of which referred to the life of St. Teresa of Avilla, the famous sixteen-century nun. The film depicts, inter alia, Teresa in the scene in which she passionately kisses the lips of the figure of Jesus Christ, fastened to the cross, and creates the impression that she has sexual intercourse with him. The British Board of Film Classification regarded “Visions of Ecstasy” as a blasphemous picture and refused to grant a distribution certificate to its producer. The ECtHR did not consider this decision to be

a violation of Article 10 of the European Convention on Human Rights.

As it can be seen, the ECtHR carefully examines cases in which religion is at issue. Far from holding that freedom of expression is given preference in such cases, the European Court tries to balance the value of free speech with the value of both tolerance and restraint in religious matters. The case of *Lautsi v. Italy* (2011) concerned the problem of religious symbols. The applicant argued that the Italian authorities interfered with her right to freedom of conscience by allowing the display of the Christian cross on a classroom wall in the state-school attended by her children. The ECtHR did not share this view. Instead, it stressed that displaying crucifixes in schools run by states in which Christianity is a majority religion cannot be considered a violation of the ECHR.

The case-law of the European Court of Human rights shows the complexity and dynamics of relations between the right to freedom of expression and the right to freedom of conscience. On the one hand, the former can become a means of vindicating the latter, on the other it may be used as a tool of suppressing religious views and practices. The ECtHR's jurisprudence also shows that it is extremely difficult to pay respect to both values at the same time. The afore-mentioned case of *Lautsi v. Italy* illustrates it very well. Although the display of the cross in a school run by the state with an overwhelming majority of Catholics may seem justified, it can also raise concerns of those who do not belong to this majority. They may regard such a situation as a form of proselytism or a piece of evidence proving that freedom of conscience and freedom of expression are not universal rights but privileges accruing only to the majority.

Doubtlessly, the two freedoms discussed here may often be at odds with one another. As already mentioned, conflicts occur also between freedom of speech and other rights enshrined in human

rights catalogues. Let us now briefly examine the relations between freedom of speech and the prohibition of discrimination.

Freedom of speech and the ban on discrimination

The prohibition of discrimination is acquiring more and more importance as a human right. Pursuant to this right, everyone is entitled to exercise all the rights and freedoms embodied in the Universal Declaration of Human Rights and other human rights documents. “Everyone” means here the lack of distinction of any kind: birth, race, colour of skin, sex, religion, ethnicity, national or social origin, language, political views, financial status, etc.

With reference to freedom of speech, discrimination marks its presence in the verbal treatment of people. It boils down to offending, insulting or affronting individuals or groups of persons because of their characteristics mentioned above. Such abuses are common in everyday life and they occur not only in authoritarian regimes, where certain groups of people are persecuted and marginalised, but also in democratic countries, which emphasise their dedication to the idea of tolerance and justice.

In the case of *Jersild v. Denmark* (1994), the European Court of Human Rights had to decide between these two rights: freedom of speech and prohibition of verbal discrimination. The case concerned the Danish journalist Olaf Jersild, who hosted the TV programme Sunday News Magazine, addressed to a well-educated and ambitious audience. In general, the programme dealt with serious political and social problems. In *Jersild v. Denmark*, at issue were immigration, refugees, xenophobia and hate speech. Three young members of the organisation called “Greenjackets” (“grønjakkerne”), whom Jersild invited to his programme and interviewed, made a number of derogatory remarks about foreigners who come to Denmark in order to find a job and settle down here. One of the most abusive of these remarks was the sentence: