Tore Lindholm (The Norwegian Centre for Human Rights, University of Oslo):

Social Stability and Equal Protection of Conscience (10 to 13 minutes)

Initially, my question was:

Can *by right* a country's legal protection of conscientious claims of **people who are religious** *exceed* its legal protection of conscientious claims of **people who are not religious —** and does such differential treatment have an impact on social stability?

In other words: how **disruptive** (if at all) **of social order** is discrimination between protection of claims grounded in serious **religious conviction,** on the one hand, and, on the other hand, protection of claims grounded in serious **non-religious conviction**?

Having thought for some weeks about social stability-implications of differential legal protection of religious *versus* legal protection of non-religious belief I have concluded I should to drop entirely addressing social stability in the abstract. Instead, I shall discuss the normative issue of the law favoring protection of religious people's conscience over protection of non-religious people's conscience.

What strikes me is that the law favoring protection of conscience grounded in religious conviction over protection of conscience grounded in non-religious conviction is unfair. Such discrimination is, I shall argue, prohibited by internationally acknowledged human rights law, and it is in breach of straightforward religious morality: the morality of the Golden Rule.

Let me first spell out the human rights principle I have in mind and then indicate my understanding of the Golden Rule.

The wide scope of "religion or belief"

The term *religion or belief*, used in international law of human rights after 1945, includes religion as traditionally demarcated. But *religion or belief* also includes non-religious fundamental conviction. Moreover, people who identify neither in terms of their religion nor in terms of their non-religious conviction are similarly covered by international human rights law.

The point of such an *inclusive reference* is that no human being is excluded from the human rights protection prescribed by what is for short called "the right to religious freedom." The point is spelled out in the authoritative 1993 "General Comment No. 22" of the United Nations Human Rights Committee, addressing "The Right to Freedom of Thought, Conscience and Religion (Article 18):"

> (2) Article 18 [of the International Covenant on Civil and Political Rights] protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief.[1]

[1] www.refworld.org/docid/453883fb22.html

Similarly, the European Court of Human Rights in its1993 landmark decision *Kokkinakis v. Greece* states:

> (31.) As enshrined on Article 9 [of the European Convention on Human Rights], freedom of thought, conscience and religion is one of the foundations of a 'democratic society,' within the meaning of the Convention. It is, in its religious dimension, on of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, skeptics and the unconcerned.[2]

The same inclusive notion about the human right to freedom of religion or belief was spelled out at our conference here at the Center for Law and religious Studies, exactly two years ago today, by professor Franciose Tulkens, formerly a Judge and Vice President of the European Court of Human Rights.[3]

I shall add a brief note on the *language* used in Article 18 of the UDHR, the provision protecting freedom of "religion or belief." The English term "- - - or belief" should **not** be understood to include solely religious belief. The point is to include for protection also the freedom of basic non-religious convictions (life stances, "Weltanschauungen"), such as skepticism, atheist doctrines, and indifference to matters of religion or life stance. This is clearly indicated by the term "убеждения", used in the Russian original proposal for the language of Article 18 back in 1947-8. The better French translation is "conviction", and not "croyance " or "foi."

The terminology may be confusing. In what remains of this presentation I shall sometimes use the term "religion" so as to refer to the convictions and adherence of the religious in the traditional sense as well to the convictions and adherence of the traditionally non-religious.

Let me now turn to the relevant and well-known moral rule of religious morality I have in mind.

The Golden Rule

The Golden Rule is found with small variations in the scriptures of almost all religious traditions. In the gospel of Matthew 7:12 (and similarly in Luke 6:31) Jesus is reaffirming what rabbi Hillel the Elder (referring to Leviticus 19:18) had taught one or two generations earlier: "So in everything, do to others what you would have them do to you, for this sums up the Law and the Prophets."

Does the Golden Rule apply to how religious people who are citizens of a contemporary democracy should deal with their "others", with the non-religious citizens concerning the *legal protection of their respective freedom of religion or belief*? Does the Golden Rule apply to how the secular law of religiously diverse polities should regulate matters of freedom of religion or belief between

---

[2] http://hudoc.echr.coe.int/eng?i=001-57827#{"itemid":["001-57827"]}

[3] *Brigham Young University Law Review* 2014 No. 3, pp. 509-530

differing religious and non-religious groups and individuals? Myself a Norwegian Lutheran I can have little doubt, coming from a country that only recently have ended centuries of hegemonic and privileged state-church status for the Evangelical-Lutheran religion and its adherents, to the disadvantage of all others in the realm. — The Golden Rule most certainly applies to legal regulation of the relationship between religious majorities and religious minorities.

The American legal tradition of religious freedom-protection

The most important and rich national legal tradition in the field of protection of religious liberty is, in my view, that of the US. When the UDHR was elaborated in 1947-8, American NGO and religious activists, among them John Foster Dulles and Frederick Nolde, effectively lobbied for strong and clear-cut protection of religious liberty in the language of the Declaration. They were successful perhaps too much so.

For there is a problem here: Madison's famous *Memorial and Remonstrance*, the First Amendment to the US Constitution, and later Supreme Court uses of the ministerial exception seem to have triggered a theist reading of "religion" and exclude a reading of "religious liberty" such that agnostics, atheists, skeptics, scientistic rationalists etc. are *not included* for protection on par with theists.

As I have argued in some length earlier[4] legal protection of freedom of religion or belief must accommodate the legitimate diversity of differing religions and worldviews in contemporary America and cannot exclude *protection of the conscientious commitment of human beings who are not religious*.

Equal protection of conscience: two challenges

(I) Can we who are religious (in the traditional meaning of the word) still justify privileged legal protection of our beliefs, our faith-based practices, and our institutions over and above similar protection for humanists, atheists, skeptics, and non-religious rationalists? I do not think so. Of course, we must mbe mindful of the distinction between matters of *forum internum* and matters of *forum externum.* US jurisprudence and ECtHR jurisprudence have found reasonable but somewhat similar ways of restriction legitimate intervention in the practices and institutions grounded in faith or conviction. I shall not address this very complex issue.

(II) The last challenge I want to address in concluding my remarks is the laudable legislative compromise (S.B. 296/297) reached here in the state of Utah in March 2015 between parties that we are use to identify as belligerent antagonists in the American culture war: traditional faith groups versus gay rights groups.

[4] *"*Magna Carta and Religious Freedom*"* in Magraw, Martinez, Browell II (eds.) *Magna Carta and the Rule of Law,* ABA Publishing 2014, pp. 193-226

This piece of democratic state legislation in Utah does not at all satisfy the maximalist demands of the LDS church nor the maximalist demands of LGBT groups.

But what is so remarkable is that it is acceptable to both parties nevertheless because, and in so far as, it regulates access to housing and to employment in a manner both parties have worked out through dialogue, negotiation, and mutually respectful conversations premised on the need for *practicing civility* across deep divides that are not to be eliminate.

My congratulations! Utah is in my view a model not necessarily in the specific legislative outcome of political compromise, but in the exercise across deep divides of mutually respectful civility.