

Dilemma of Religious Freedom in the Context of Cultural Relativity and State Sovereignty

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ABSTRACT

Religious freedom is one of the oldest rights regulated by international human rights instruments. It guarantees everyone to have, adopt and manifest their religions or beliefs in a wider context, not limited in legal definition and certain religious values. However, the concept and application of this right has become controversy in many states. One fundamental reason is due to the existence of cultural and religious relativism. Even though religion in nature does not refuse international religious freedom, some religious fundamentalist believe that the dimension of religious freedom can destroy the core religious values. Additionally, there are some states, which stand on the concept of state sovereignty even though they have clearly violated religious freedom. The legal fact shows that there is paradoxical regulation between the urgency to develop human rights from international human rights regime and the United Nations Charter, which protect the sovereignty of state from alien interference. Therefore, the violation against religious freedom will still occur if there is no enough national regulation, which comprehensively protect, promote and fulfil this right.

Keywords: *religious freedom, cultural relativism, and state sovereignty*

Hans Kung (1991), a Germany-Roman Catholic theologian argued that there is no world peace without peace among religions and no peace among religions without accurate knowledge of one religion to another. It is reliable because religion encompasses beliefs and world-view which illuminates the very ground of our being and which invests life with ultimate meaning and direction (Giannella

1967). This proposition illustrates that religion has a power to construct public consciousness with its transcendental and supernatural values. Therefore, it should be noted that the role of religion is significant to create peace and it can be achieved when people respect the difference within or between religions. People should be aware about the difference of religious beliefs and respect the right of others to have religion or belief as a matter of inherent right for human beings. In the legal context, 'accurate knowledge' here should be noted as recognizing and respecting the rights of other religions.

In fact, the problem to recognize religious freedom in international human rights law has taken place since the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. For instance, Saudi Arabia was abstaining to sign the UDHR due to the provision of 'the right to change religion' because they argued that this right violates Qur'an (Sieghard 1983). The regulation also did not acknowledge such right as a gift from God because some Muslims believe that their religion is given by God. However, the delegation of Pakistan defended his country's support for the declaration on the grounds that Qur'an permits one to believe or disbelieve (Traer 1991). Evans (1997) argues that this different argument illustrates that religious freedom as one of the oldest rights has become the most controversial right since the adoption of UDHR. However, Islam in nature does not refuse the concept of religious freedom but it is rather about the different interpretation of religious teaching from human beings.

Afshari (1994) argues this problem shows that certain people particularly those who stand on the orthodoxy of religion were not prepared to recognize religious freedom for which this was one of the fundamental prerequisites to reinforce international human rights law. Some argue that human rights are bound to fail for the respective religious, cultural and political systems of the world because it attributes differing contents to the notions of freedom and dignity. Additionally, it perceives at least some differences in the rights and freedoms, which are conducive to their attainment (Malcolm 2007). This leads to inextricable distortion for the application of international human rights because it faces the existence of cultural and religious relativity in many states. For instance, the concept of religious freedom is strictly prohibited by many states in Middle East and in some occasion refused by Asian states including Indonesia.

Robinson as quoted by Boyle (2006) states that the history of religion exhibits that religious difference has often been perceived by certain adherents of religion as a threat. Additionally in many cultures, religion is used as pretext to separate communities and to stir up distrust of those regarded as different. This may resort to religious persecutions as a reason to defend their existence. Based on estimates in 2000, 33 percent of the world's people live under regimes that fundamentally restrict religious liberty and another 39 percent reside under partial restrictions

(Hertzke 2004). These persecutions scattered in around the world, both in modern-developed countries as well as in poor countries. Religious persecutions are still going on until recently even though the international human rights regimes has established special human rights bodies and adopted international covenants and declarations on religions or beliefs.

Unlike the problem of social and economic rights which have commonly occurred in under developing states, religious persecutions have occurred either in the poor, religious, modern or secular states. Religious persecutions in under developing states commonly happened as a matter of law enforcement to protect religious minority groups. In addition, the conflict of law in the national legal system may also cause discriminative treatments to certain religions. On the other hand, the modern and secular states also violate religious freedom for many reasons. For instance, the government of France banned a headscarf as the manifestation of religion for Muslim and other ostentatious symbols of religions from all public schools. It is assumed that Islam phobia, anti-Semitism, religious proselytization, political interest, the relation between majority and minority religions and the orthodoxy of religion may cause religious persecutions.

Hodge (2006) assumes that there is no nation has a perfect record on religious freedom. Religious persecution occurs in Myanmar as one of the poorest states in Asia and in the United States as one of the most modern and democratic states in the world. Regarding to this, religious persecutions either by state or non state actors have performed in various forms for years. The restrictions are based on religious beliefs or regulations to have or to adopt certain religions or beliefs and to manifest its teachings. Therefore, respecting and promoting religious freedom as the indispensable right is in need of raising human dignity not only for religious persons but also for all.

This writing examines the legal reason of religious persecutions as a matter of state sovereignty. This topic is quite interesting because many states still violate religious freedom even though they have ratified international human rights instruments. For instance, it is concluded that religious persecutions in state parties such as Indonesia do not reduce even though it has already ratified International Covenant on Civil and Political Rights (ICCPR). Therefore, it shows that the ratification of the international human rights instruments does not guarantee that the violation of human rights will reduce after the state party is bound to the Covenants. It is also interesting to discuss how the comprehensive provision of religious freedom in ICCPR faces the cultural relativism. Eventually, this study is purposed to show how international regime such as human rights committee as well as United Nations can not interfere human rights violation.

Dimension of Religious Freedom

It is worth to putting religious freedom within its wider context as a human right. Donnelly (1982) argues that human rights are rights, characterized as universal, not benefits, duties, privileges, or some other perhaps related practice as the result of the dignity of one as being human. To be entitled to those rights, someone should not be anything other than human. Piechowiak (in Hanski and Markku eds. 1999) similarly proposes that the universality of rights is rooted in the inherent dignity and the inherency of these rights in character. Article 2 of the UDHR and article 2 (1) of the ICCPR also assert that rights should not be limited on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. It is concluded that international human rights law concerns the right of every individual to receive equal treatment in all situations. This is related to article 1 of the UDHR, which states that, “all human beings are born free and equal in dignity and rights.” Therefore, the entitlement of rights should not refer to the status of a person as a member of a minority or majority group, religious affiliation, political party, or other organisations or his status as a person who has a difference religion or beliefs.

In Resolution No. 48/128 on the Elimination of All Forms of Religious Intolerance (2004), General Assembly asserts that religious freedom is derived from the inherent dignity of the human person. However, it does not further define religious freedom and neither do the other international covenants. Therefore, the definition of religious freedom may be observed from case law, general comment by international legal body such as Human Rights Committee. For instance, the element of religious liberty can be noted from a phrase ‘the right of thought, conscience, and religion or beliefs.’ This basic standard of religious freedom is laid down in article 18 of the UHDR and article 18 of the ICCPR. The article 18 UDHR says: “everyone has the right to freedom of thought, conscience and religion: right includes freedom to change his religion or belief, 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.”

This provision is emphasized by article 18 (1) of the ICCPR which assert the similar elements of religious freedom. Article 18 (1) of the ICCPR uses the phrase ‘to change..’ rather than ‘to adopt..’ However, the different emphasis should not be understood as the intention of the international human rights regime to reduce the scope of religious freedom.

Human Rights Committee (HRC) in its General Comment No. 22 (1993) pronounces that the ‘right to freedom of thought, conscience, and religion’ is far reaching and profound because 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 and in public or private. It also asserts that article 18 of the ICCPR protects theistic, non-theistic and atheistic beliefs, and the right to have or adopt a religion or belief. It means that religion should not be defined in a narrower definition because that would only restrict the scope of religious freedom. The decision of Supreme Court of Cyprus in the case of *Pitsillides v Republic of Cyprus* illustrates that the right to freedom of religions or beliefs includes convictions such as agnosticism, free thinking, pacifism, atheism and rationalism (Jayawickrama 2002).

Based upon these provisions, the definition of religious freedom encompasses the right to have or to adopt religion or belief in any matters such as the rights to profess or not to profess theistic or nontheistic religions or beliefs and to manifest any form of religious beliefs either individually or in community with others in public or private prescribed by international human rights law. The 'manifestation of religions or beliefs' should encompass a broad range of acts, which are not limited to the orthodoxy and tradition of religions or beliefs but also should entail 'any symbols' recognized by certain people as the manifestation of their religions or beliefs.

The definition encompasses two dimension religious freedoms. The first is the core rights called *forum internum*. In General Comment No. 22, HRC (1994) points out that *forum internum* encompasses freedom of thought and conscience or the freedom to have or to adopt a religion or belief of one's choice without any limitation. It further asserts that freedom to have or to adopt religion or belief necessarily entails the freedom to choose a religion or belief including, *inter alia*, the right to replace one's current religion or belief with another or to adopt atheistic views. These freedoms are protected unconditionally, even can not be reduced or limited in any reason. Additionally, religious freedom also encompasses the right to manifest religion or belief called *forum externum*. This right is regulated by article 18 of the UDHR and ICCPR, which assert that everyone has the right to manifest his religion or belief in teaching, practice, worship and observance. Jahangir (2006) argues that *forum externum* may be invoked both in terms of the positive freedom of persons who wish to wear or display religious symbols and in terms of the negative freedom of persons who do not want to be confronted with or coerced into it.

The symbols of religions or beliefs should not be limited in term of official or traditional religions. However, article 18 (3) of the ICCPR provides a provision, which limit these manifestations of religion or belief based on the other fundamental norms. This article regulates that freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental

rights and freedoms of others. HRC (1994) in General Comment No. 22 asserts the limitation of religious manifestation may not be imposed for discriminatory purposes or applied in a discriminatory manner, because the limitation on *forum externum* should address the concept of proportionality. The proportionality means that the limitation of religious manifestation is allowed if those disrupt the public order. For instance, religious preaching or public worship can not be performed on the street due to the essential purpose of a street for public travel.

Problem of Relativism and State Sovereignty

Religious freedom in international law has a very broad scope while the manifestation of religion or belief is not limited to historical religious manifestation. However, the concept of religious freedom will be difficult to be implemented in certain cultures especially which stand on cultural relativism. The doctrine of cultural relativism asserts that rules about morality vary from place to place because the understanding of 'certain values' depends on cultural context (Vincent 1986). Additionally, he says that moral claims derive from, and are enmeshed in, a cultural context, which is itself the source of their validity because there is no universal morality. Renteln (1990) similarly argues that the culture in this sense is very powerful to shape individuals' perceptions that understanding the way of life in other societies depends on gaining insight into what might be called the inner cultural logic.

An Na'im (1990) believes that the main difficulty with working to establish a universal standard of human rights across cultural, and particularly religious, boundaries is that each tradition has its own internal frame of reference because each tradition derives the validity of its precepts and norms from its own sources. Similarly, Afshari (1994) believes that the international human rights standards have a better chance of being put into practice if they reflect cultural ideas. Therefore, there is a 'high tension' of difference between the concept of universalism of human rights and cultural relativity because all provision of human rights will be differently understood by states in some cases. On the other hand, the international human rights systems do not recognize the cultural existence and therefore certain religions cannot speak the language of human rights in their own tongue. This reality often causes a conflict of norm between the universality of human rights and local culture emanated from religions.

As stated by Hans Kung (1997) that in the light of the fatal role, religions have played in recent history and still play—in connection with human rights. Crawford (in Crawford and Lipschutz eds. 1998) similarly argues that in certain states, religion becomes a national identity and political force. Religion in some occasions also plays a significant role, which become a source of morality in national law.

The law is an instrument of social control and becomes a social institutions in all situation based upon certain social rules within society (Marmor 2006). This leads to the existence of local cultural traditions (including religious political and legal practices) properly determine the existence and scope of civil and political rights enjoyed by individuals in a given society (Howard 1993). Certain religious adherents use their own insight to determine religious freedom because this right is closely related to their core religious values. For instance, some Islamic fundamentalisms argue that any religions or beliefs seen as 'deviance' can not be granted religious freedom because they can destroy the Islamic core beliefs.

It is important to note that the law should play a non-discrimination role in settling the disputes equal rights especially between majority and minority groups. Majority groups, which usually have a higher rank of social status, has better access to equality before the law while the minority should be granted their rights due to their status as human being. Based on that, it is important to internalize the norms of religious freedom, so that external pressure from international regime is no longer needed to ensure compliance from state party.

Human rights regimes may be able to interfere in the state sovereignty to provide humanitarian intervention if the violation is categorized as gross violation, which threatens the live of persons (Shaw 2006). For instance, the UN can establish international criminal jurisdiction in order to bring to trial persons responsible for crimes under international law such as genocide and other gross violation of human rights (Boven 1995). The UN has established five international criminal tribunals in Rwanda, Yugoslavia, Nuremberg, Tokyo and Cambodia to prosecute genocide perpetrators. However, this scheme does not apply to violation against religious freedom because this violation is not categorized as gross violation. It means the states can stand on the concept of state sovereignty, which regulates that any interference is strictly prohibited by the UN Charter. Mills (1998) argues that state sovereignty is a supreme authority within a state border, which prohibits any authorities or entities with the authority to take any coercive or any type of action within the territorial limits of the state.

If the interference of international system against the state sovereignty is determined by the 'type of violation,' the international human rights regimes would not be able to interference all violations of religious freedom. In fact, religious persecution occurred in almost every state. It means that this concept diminish the inherent dignity of human beings who should enjoy their religious freedom. In fact, Grant (2007) asserts that the importance of human dignity as the cornerstone of international human rights law has been confirmed by numerous international human rights instruments. It means that respecting human dignity is a universal value by which all states must comply to honour it.

Conclusion

The international human rights instruments broadly cover religious freedom because it does not recognise specific religions or beliefs. Categorizing religion in a legal definition only restricts non orthodox religious sects, which have always emerged and existed as a social reality. The international human rights instruments offer a generous provision on religious freedom because they cover the right to have or not to have religion. It should be understood that the generosity of international human rights instruments is purposed to keep the purity of religion. Persons are free to practice their religions or beliefs as a fact that they should be granted religious freedom, not as a matter of their religious beliefs. Therefore, religious freedom is not only necessarily associated with religions but more about respecting human beings with their choices of life.

However, the ratification of international covenants by a certain state, especially by a diverse and multicultural state such as Indonesia, does not guarantee the prevention against the violations of religious freedom. The reason is that the application of religious freedom challenges the existence of religions, which have existed in society for many years. It influences people's consciousness about the concept of religious freedom because religion in nature has a sort of morality while on the other hand the international human rights instruments do not recognise cultural relativity. The application of religious freedom faces difficulty when its provision is contradicted with the orthodox Islam and this is a problem because it has its own interpretation of religious freedom. Changing religion or 'apostasy' is even liable to the death sentence in Islamic orthodoxy.

However, the international human rights regime cannot interfere in the case of religious persecution unless it is considered as a gross violation against human rights. The intervention either by using force or providing humanitarian services by one or more state on behalf of the United Nations or international non-governmental organisation to protect the victims 'is not justified under international law (Conlon 2004). Hathaway (2007) similarly argues that even though human rights treaties such as the ICCPR theoretically create a hard law characteristic because they bind a state party, they have a soft law characteristic in practical matters. It is because the international systems do not authorize any substantial legal sanction against a state party, which violates such rights. Therefore, any sovereign states can stand on their sovereignty to refuse any international interventions to investigate the alleged violations against religious freedom. In other words, it may be noted that the implementation of human rights firmly depends on the domestic legal enforcement from a state party.

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