

5-1-2017

When Does Cultural Satire Cross the Line in the Global Human Rights Regime?: The Charlie Hebdo Controversy and its Implication for Creating a New Paradigm to Assess the Bounds of Freedom of Expression

Kwanghyuk Yoo

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>

 Part of the [Comparative and Foreign Law Commons](#), [Human Rights Law Commons](#), [International Law Commons](#), [Law and Politics Commons](#), and the [Public Law and Legal Theory Commons](#)

Recommended Citation

Kwanghyuk Yoo, *When Does Cultural Satire Cross the Line in the Global Human Rights Regime?: The Charlie Hebdo Controversy and its Implication for Creating a New Paradigm to Assess the Bounds of Freedom of Expression*, 42 *Brook. J. Int'l L.* 761 (2018).
Available at: <https://brooklynworks.brooklaw.edu/bjil/vol42/iss2/4>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

**WHEN DOES CULTURAL SATIRE
CROSS THE LINE IN THE GLOBAL
HUMAN RIGHTS REGIME?: THE
CHARLIE HEBDO CONTROVERSY AND
ITS IMPLICATION FOR CREATING A
NEW PARADIGM TO ASSESS THE
BOUNDS OF FREEDOM OF
EXPRESSION**

*Kwanghyuk Yoo**

A human right can only be found upon this Natural Law, and the great principle which governs both the one and the other throughout the world is this: Do unto others as you would have done unto yourself.¹

INTRODUCTION	762
I. OVERVIEW OF THE CHARLIE HEBDO INCIDENT	765

* Candidate, Doctor of Juridical Science, University of Iowa College of Law; Former Full-Time Lecturer, Seoul Women's University, Seoul, Korea; LL.M., University of Iowa College of Law; LL.B., M.A. & Ph.D., Hanyang University College of Law, Seoul, Korea. Email: kwyoo1997@gmail.com; kwanghyuk-yoo@uiowa.edu. I extend my sincere gratitude to the late Professor Burns Weston for his careful advice and comments on the first draft. At the international law seminar offered by the University of Iowa College of Law, he provided me with a significantly valuable firsthand guidance in my drafting of this article. I also heartily thank Professor Dr. Brian Farrell for his kindness in giving me the unique chance to present this article at the Third Annual Iowa Human Rights Research Conference and his thorough comments as a discussant at the Conference. I also wish to thank Theodore Potter, James Hansen, Alexis Steele, and Shelby Wood for their meticulous review and all the useful comments on previous drafts. Additionally, I am grateful to Jessica Martin, incumbent Editor-in-Chief of the *Brooklyn Journal of International Law* and Travis Marmara, former Editor-in-Chief, for their hard work of scrupulous review and edits throughout the entire publication process. All errors or omissions are my own.

1. VOLTAIRE, TREATISE ON TOLERANCE AND OTHER WRITINGS 28 (Simon Harvey ed., Brian Masters & Simon Harvey trans., 1st ed. 2000).

<i>A. Factual Background of the Charlie Hebdo Incident</i>	765
<i>B. Clarifying the Human Rights Issue at the Heart of the Charlie Hebdo Incident</i>	768
II. THE UNIVERSAL RESPECT FOR FREEDOM OF EXPRESSION	770
<i>A. The Universal Nature of Human Rights</i>	771
<i>B. Freedom of Expression Guaranteed by International Instruments</i>	773
III. THE RELATIVE PROTECTION OF FREEDOM OF EXPRESSION	779
<i>A. The Relative Nature of Human Rights</i>	779
<i>B. Statutory Limits of Freedom of Expression</i>	781
IV. DISCOURSE ON THE RELATIVE UNIVERSALITY OF HUMAN RIGHTS	789
<i>A. Cultural Relativism</i>	789
<i>B. The “Social Integrity” Standard for the Evaluation of Normative Admissibility of Cultural Relativism</i>	795
CONCLUSION	804

INTRODUCTION

On November 13, 2015, Paris was in a state of complete pandemonium due to a terrorist attack. This fatal attack committed by radical Islamists resulted in approximately 130 innocent deaths and was reported to be “the most deadly assault on French soil since World War II.”² While this tragic attack evoked worldwide public indignation, the ideological dissension controversy behind this atrocity leaves room for further theoretical discourse.

Our modern times rest on a firm basis of the spirit of tolerance that calls upon us to acknowledge and accommodate disparate

2. See Anthony Faiola & Souad Mekhennet, *Paris Attacks Were Carried Out By Three Groups Tied to Islamic State, Official Says*, WASH. POST (Nov. 15, 2015), https://www.washingtonpost.com/world/string-of-paris-terrorist-attacks-leaves-over-120-dead/2015/11/14/066df55c-8a73-11e5-bd91-d385b244482f_story.html.

ideas, cultures, or religions of others. Over the past 250 years, this spirit served as an ideological foundation propelling civil campaigns for liberal democracy after French philosopher, Francois-Marie Arouet, better known for his pen name, Voltaire, mordantly criticized contemporary society throughout his famous book "Treaties on Tolerance," for its prevalent tendency to resist deviation from generally accepted thought.³ While the virtue of tolerance is taken for granted today, a recent high-profile incident that also occurred in France ten months before the November 2015 Paris attack deserves special attention, as it posed the crucial question of whether, and to what extent, intolerance should be tolerated. This tragic terrorist attack, otherwise known as the *Charlie Hebdo* shooting, occurred on January 7, 2015, and shattered deep-rooted complacency about the absolute protection of freedom of expression and manifested the ideological and cultural conflict between Islam and the West.⁴ In the attack, at least two armed men of Muslim faith shot to death twelve people at the Paris headquarters of the newspaper, *Charlie Hebdo*, which had previously published what was intended to be a satirical cartoon of the prophet Mohammad.⁵ This act of terrorism is described as a reaction by extremists with Islamic backgrounds to a blasphemous depiction, which seems to have insulted their cultural and ethnical identity or represented Islamophobia at the extreme. But what genuinely matters is that the *Charlie Hebdo* incident invites controversy over the legitimate purview of human rights beyond factual inquiries into the incident. This incident drew waves of public attention and sympathy, not merely because it forced society to face fears of brutal terrorism but also because it served as a reminder of the violable nature of human rights. While the global community has doubtlessly understood that the *Charlie Hebdo* shooting was an intolerable, material threat to the fundamental human right of freedom of expression, analysis of the incident undermines the certainty that international human rights law generally protects

3. VOLTAIRE, *supra* note 1.

4. See Maayan Lubell, *Thousands of Palestinians Protest Charlie Hebdo Mohammad Cartoon*, REUTERS (Jan. 24, 2015), <http://www.reuters.com/article/2015/01/24/us-france-shooting-palestinians-idUSKBN0KX0M920150124>.

5. See Dan Bilefsky & Maia de la Baume, *Terrorists Strike Charlie Hebdo Newspaper in Paris, Leaving 12 Dead*, N.Y. TIMES (Jan. 7, 2015), http://www.nytimes.com/2015/01/08/world/europe/charlie-hebdo-paris-shooting.html?_r=0, at A1.

such a right. A close, second look of well-established principles of freedom of expression and cultural relativism invites careful reconsideration of conventional statutory limitations on freedom of expression. Consequently, it follows that the legitimate implementation of those principles may call for reconceptualization of freedom of expression, to an extent that it is interpreted as being subject to further normative limitations from a socio-legal perspective, so long as the seemingly genuine exercise of such freedom is found to have in effect crossed the line demarcated by the social integrity standard in the cultural relativism context. This insight derived from the *Charlie Hebdo* controversy proposes that freedom of expression should be rigorously circumscribed within narrower bounds when it is detrimentally in conflict with social integrity. It may be under this circumstance that a stronger chilling effect on freedom of expression is deemed licit under the global human rights regime.

This article raises the fundamental question of whether international human rights law has the legitimate right to reject cultural intolerance. The article does not intentionally criticize or discount Islamic or Western ideologies. Nor does it aim to challenge current international human rights standards; rather, it attempts to propose a new paradigm of the legitimate scope of freedom of expression in the context of heterogeneous ideological conflict. Thus, this article posits that human rights have both universal and relative attributes, and that, ultimately, cultural relativism should play a role in the delimitation of freedom of expression. In pursuit of this objective, Part I of the article will review the factual background of the *Charlie Hebdo* incident, clarifying the hotly debated human rights issue of freedom of expression. Part II of the article will provide a general discussion of freedom of expression under the international human rights law. This Part will examine freedom of expression guaranteed by various international instruments established under both the United Nations and other regional regimes. It will also provide clarification that all human rights and freedoms are subject to universal enjoyment and exercise, in that everyone is entitled to the same rights and freedom without any discrimination on such grounds as race, sex, color, language, religion, natural or social origin, and economic status. Part III of the article will pinpoint the statutory limitations on freedom of expression in the context of the relative attribute of human rights. This discussion will be based on the distinction between universal respect for human

rights and their absolute protection. This Part will provide a detailed discussion in the international plane and case law, which helps to identify specific circumstances where freedom of expression is subject to statutory limitations. Part IV of the article will address legal issues of the relative universality of human rights by canvassing the concept of cultural relativism and presenting a “social integrity” standard, as derived from the context of intra- and inter- societal relations. This Part will show that cultural relativism should serve as the key threshold in deciding whether freedom of expression is subject to statutory restrictions in enjoyment and exercise. It will subsequently stress the significance of taking into account the possibility of impediment to the fundamental social integration as an essential criterion to assess the normative admissibility of the cultural relativism threshold. Finally, the conclusion of this article will summarize the foregoing detailed discussions, stress the significance of guiding rules identified in such discussions, and carefully evaluate the *Charlie Hebdo* controversy as framed by the relative universality of human rights under those rules. By doing so, the article will derive underlying implications for creating a new paradigm to assess the bounds of freedom of expression.

I. OVERVIEW OF THE CHARLIE HEBDO INCIDENT

This Part will provide a detailed account of the *Charlie Hebdo* incident, discussing who was involved, what occurred, and the impact that it had on innocent lives. It will also reveal *Charlie Hebdo*'s prior use of satire against the Islamic faith. This Part will continue by explaining how the *Charlie Hebdo* incident fits into the larger debate surrounding the scope of freedom of expression protected under international human rights law.

A. *Factual Background of the Charlie Hebdo Incident*

The terrorists who perpetrated the *Charlie Hebdo* attack were three young men in their thirties—brothers Cherif and Said Kouachi, who were of Algerian descent,⁶ and Amedy Coulibaly,

6. See *Paris Attacks: Suspects' Profiles*, BBCNEWS (Jan. 12, 2015), <http://www.bbc.com/news/world-europe-30722038>.

a French citizen of Malian parentage.⁷ In their three days of violence, the Kouachi brothers attacked the *Charlie Hebdo* offices, killing twelve people, while Coulibaly murdered four hostages at a kosher supermarket on January 9, 2015.⁸ In the wake of this tragic two-pronged attack, people all around the world held solidarity rallies to commemorate the victims. Additionally, on January 11, 2015, around 3.7 million people and forty world leaders—including French President, Francois Hollande, British Prime Minister, David Cameron, German Chancellor, Angela Merkel, and Spanish Prime Minister, Mariano Rajoy—marched in antiterrorism rallies in Paris and elsewhere in France. Reportedly, the Parisian march constituted the largest mass gathering in French history.⁹ Many carried signs depicting the now-famous phrase, “*Je suis Charlie* (I Am Charlie),” in honor of the victimized journalists.¹⁰ This simple phrase implied various political messages, depending on the interpretation of the words “I” and “Charlie.” While “I” may mean individuals commemorating the victims, French nationals, or citizens in support of democratic government, “Charlie” may refer to individual victims, the magazine *Charlie Hebdo*, or freedom of expression generally. In opposition to this phrase, a minority of marchers chanted, “I am not Charlie.” The significance of the *Charlie Hebdo* incident transcends the individual terrorist attacks. The declarations—“I Am Charlie” and “I Am not Charlie”—hold a lens to the severe tension of the long-standing conflict between Islamic and Western cultures. At the core of this conflict is the tension between freedom of expression and ideological censorship.

Charlie Hebdo, formerly known as *Hara-Kiri Hebdo*, began as a weekly publication in 1960. The term “Hara-Kiri” comes from the Japanese term for “ritual suicide by disembowelment practiced by the Japanese samurai or formerly decreed by a court in

7. See “*That was Just the First Amedy Coulibaly*,” CBSNEWS (Jan. 19, 2015), <http://www.cbsnews.com/news/paris-terror-attacker-amedy-coulibaly-radicalized-in-french-housing-project/>.

8. See *Charlie Hebdo Attack: Three Days of Terror*, BBCNEWS (Jan. 14, 2015), <http://www.bbc.com/news/world-europe-30708237>.

9. See Ashley Fantz, *Array of World Leaders Joins 3.7 Million in France to Defy Terrorism*, CNN (Jan. 12, 2015), <http://www.cnn.com/2015/01/11/world/charlie-hebdo-paris-march/>.

10. See Kim Willsher, Alexandra Topping & Anne Penketh, *Paris Anti-Terror Rally: All Religions, Ages and Nations in Massive Show of Unity*, GUARDIAN (Jan. 11, 2015), <http://www.theguardian.com/world/2015/jan/11/paris-france-anti-terror-rally-massive-show-unity>.

lieu of the death penalty.”¹¹ The French government forced *Hara-Kiri Hebdo* to suspend publication several times in response to the publication’s immoderate satires on society and culture. In 1986, *Hara-Kiri Hebdo* ceased publication after it satirized the death of former French president Charles de Gaulle. Shortly afterward, *Charlie Hebdo* replaced *Hara-Kiri Hebdo* and continued to publish vulgar and obscene articles with satirical cartoons. Religious and political groups alike have vigorously denounced the magazine.

For example, in February 2006, *Charlie Hebdo* published a headline titled, *Mohammad Overwhelmed by Fundamentalism*, which was accompanied by an illustration of the prophet Muhammad carrying a bomb in his turban, analogous to a cartoon published by the Danish daily newspaper, *Jyllands-Posten*, in September 2005. Because Islam has a tradition of aniconism—an opposition to the use of icons or visual images to depict living creatures or religious figures¹²—Islamic groups considered the depiction blasphemous. The *Charlie Hebdo* cartoon offended many Muslims and led to violent protests and a class action lawsuit against *Charlie Hebdo*. The suit argued that these cartoons were discriminatory against Muslims. *Charlie Hebdo* contended, however, that Islamist religious collectivism, like Nazism and fascism, threatened democracy. In 2011, *Charlie Hebdo* published a special edition issue titled *Charia Hebdo*, a play on words mocking Islamic Sharia law, which is notorious for harsh punishment. Further, one headline in the issue threatened jokingly: “100 lashes if you don’t die of laughter.” This cartoon also satirized the possibility that Tunisia might be ruled by Sharia law because, in 2011, Arab fundamentalists in Tunisia overthrew a dictatorship and came to power in a citizen uprising, later dubbed the “Arab Spring.”¹³ Subsequently, inflamed Muslims destroyed *Charlie Hebdo*’s office by committing arson. In response, French citizens criticized the attack on *Charlie Hebdo*, deeming it to be a threat against freedom of expression and unacceptable under any circumstances.

11. See *Hara-kiri Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/hara-kiri> (last visited Nov. 15, 2015).

12. See *Aniconism Definition*, BRITANNICA, <http://www.britannica.com/EB-checked/topic/25453/aniconism> (last visited Nov. 15, 2015).

13. See JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 56 (3rd ed. 2013).

In September 2012, a subsequent *Charlie Hebdo* cartoon differed notably from its infamous predecessors. The satire of Muhammad quickly escalated, as one headline, *Intouchables 2*, included a cartoon of an orthodox Jewish man pushing a crippled Muslim in a wheelchair and, perhaps more polemically, a naked Muhammad striking a pornographic pose. The public criticized this satire for crossing the line from permissible to inappropriate, and even politicians called for restraint on *Charlie Hebdo's* satires. The 2015 terrorist attack eventually reversed public opinion, as the public has strongly condemned this attack as suppressing and destroying the French and global democratic spirit.

B. Clarifying the Human Rights Issue at the Heart of the Charlie Hebdo Incident

Terrorism itself is no doubt unlawful and unjustified for any reason. The *Charlie Hebdo* incident, however, prompts more than a discussion of terrorism. It raises the issue of whether *Charlie Hebdo's* satire on Muhammad fell within the scope of freedom of expression protected under international human rights law. From contradictory perspectives, this incident provokes discussions of the inherent limits of this freedom.

One analysis of this incident frames freedom of religion as a limit on freedom of expression. Pope Francis has said that while “to kill in the name of God is an aberration,” the faith of others should be beyond insult.¹⁴ This view seems to argue that freedom of expression is neither inviolable nor an absolute value. Hence, this freedom cannot be construed as overwhelming cultural relativity, and, furthermore, justified as the persecution of the strong against the weak. This stance criticizes the double standard that *Charlie Hebdo* has implicitly taken by asserting that its work advances democracy, freedom, and social justice. The catchphrase, “I Am Charlie,” strikes a chord reminiscent of “We are all American,” a phrase many people worldwide recited after the September 11th terrorist attacks. *Charlie Hebdo* has published satirical cartoons instigating islamophobia but has taken a passive attitude in criticizing Jewish issues, avoiding what

14. See Abby Ohlheiser, *Pope Francis on Charlie Hebdo: “You Cannot Insult the Faith of Others,”* WASH. POST (Jan. 15, 2015), <http://www.washingtonpost.com/news/world/wp/2015/01/15/pope-francis-on-charlie-hebdo-you-cannot-insult-the-faith-of-others/>.

may be perceived as anti-Semitism. In 2009, *Charlie Hebdo* fired its former columnist, Maurice Sinet, for his anti-Semitic commentary on the unfounded rumor that the son of the former French president, Nicolas Sarkozy, planned to convert from Catholicism to Judaism upon his engagement to the Jewish heiress of a large electronic goods company.¹⁵

Another analysis resists taking into account the collision of two opposing values in pinpointing the human rights issue in the *Charlie Hebdo* incident. This analysis does not interpret the *Charlie Hebdo* incident as an ideological conflict between strong Western mainstream society and a minority immigrant society. Rather, this analysis construes this incident as confirmation that freedom of expression at large relies on social commitment. Those who make this observation argue that victims of the *Charlie Hebdo* incident knowingly risked their lives to express their beliefs, and these observers may argue that no circumstance should denigrate self-expression and may warn that the partial limitation on individual freedom may lead to the complete obliteration of that freedom.

Individual views of the *Charlie Hebdo* incident differ in regard to freedom of expression. As a recipient of so much media attention, the phrase "I Am Charlie" brought into question the universality of freedom of expression, especially among journalists. What makes this incident so controversial? What was the cause of this tragic terrorist attack? The answers to these questions require delicate consideration. On the one hand, the conclusion that Islamic extremists are responsible for this attack suggests that Muslims are a heterogeneous social group outside the West and the *Charlie Hebdo* incident is an extension of 9/11. On the other hand, the conclusion that the *Charlie Hebdo* attack is an expression of long-festered intergroup conflict within French society suggests that the enemy of the state is a group inside that state. Neither case supports the idea that the *Charlie Hebdo* attack was an inevitable result of its satiric cartoons of Muhammad. Intolerance for cultural diversity and the complacent belief about the absolute value of human rights are one way to explain the aforementioned questions. Cultural relativity limits the

15. See Henry Samuel, *French Cartoonist Sine on Trial on Charges of Anti-Semitism over Sarkozy Jibe*, TELEGRAPH (Jan. 27, 2009), <http://www.telegraph.co.uk/news/worldnews/europe/france/4351672/French-cartoonist-Sine-on-trial-on-charges-of-anti-Semitism-over-Sarkozy-jibe.html>.

scope of freedom of expression. The normative significance of cultural relativity on human rights discourse should not be understated in any event, particularly where culture forms the irreplaceable basis of a set of cardinal identities of the State and underlies the functioning of its politics, economy, or society. Indeed, in Islamic countries, traditional culture enriched by indigenous religious values plays a pivotal role in establishing an overarching framework for political, economic, and societal integration. For instance, Islamic culture serves the constitutional theocracy connoting the unity of political process and religion. As such, the reach of Islamic values holds a comprehensive range from both functional and doctrinal perspectives. By contrast, Western cultural values are in general understood as being appreciably severed from or having limited interference with political, economic, and societal domains. Veritably, while most Western countries have culture whose origin has historic and religious relevance to Christianity, which in a broad sense embraces various denominations, such as Catholic, Orthodox and Protestant, they adhere to the separation of church and state, a principle common to their constitutions.¹⁶ Hence, it follows that the fundamental discrepancy of the degree of cultural influence over Islamic and Western societies explains why cultural relativity serves as a criterion to demarcate the bounds of freedom of expression. This is because the level of cultural cohesion and integration may dictate the substantive content of social consensus on freedom of expression. In this context, the stark contrast between Islamic and Western cultures stokes the need to elaborate and clarify limits on freedom of expression.

II. THE UNIVERSAL RESPECT FOR FREEDOM OF EXPRESSION

This Part will examine the universal nature of human rights by exploring the key provisions of landmark international instruments such as the U.N. Charter, Universal Declaration of Human Rights, and two paramount international covenants.

16. See E. Gregory Wallace, *Justifying Religious Freedom: The Western Tradition*, 114 PENN ST. L. REV. 485, 570 (2009). For example, the First Amendment of the U.S. Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." See U.S. CONST. amend. I. Furthermore, Article 1 of French Constitution provides: "France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. . . ." 1958 LA CONSTITUTION art. I (Fr.).

Furthermore, this Part will discuss the general meaning and scope of freedom of expression under international human rights law in the context of universal respect for human rights. This discussion will include an analysis of freedom to seek information and freedom of the press, which are characterized as fundamental human rights concomitant with freedom of expression.

A. The Universal Nature of Human Rights

The universal property of human rights stems from a belief in the inherent dignity of being human. The Charter of the United Nations (“U.N. Charter”), a treaty establishing the U.N., which was signed in June 1945 by representatives of fifty countries in San Francisco at the United Nations Conference on International Organization,¹⁷ declares that one of its key purposes is to achieve international cooperation “in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”¹⁸ Likewise, the text of the Universal Declaration of Human Rights (UDHR) unequivocally endorses the universality of human rights.¹⁹ The UDHR represents a milestone in the contemporary history of international human rights law and includes basic principles on human rights, which the international community agreed upon and committed to observe with the consensus on the significance of universal respect for human rights and fundamental freedoms.²⁰ Based on this universality, the UDHR is recognized as a milestone for helping individuals across various cultures internalize the value of human rights by drawing the

17. See *History of the United Nations*, UNITED NATIONS, <http://www.un.org/en/sections/history/history-United-nations/> (last visited July 30, 2017).

18. See U.N. Charter art. 1, ¶ 3.

19. See RHONA K. M. SMITH, TEXTS AND MATERIALS ON INTERNATIONAL HUMAN RIGHTS 36 (2nd ed. 2010); G.A. Res. 217 (III) A, Universal Declaration of Human Rights, pmbl (Dec. 10, 1948) [hereinafter UDHR] (“Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms.”).

20. *The Foundation of International Human Rights Law*, UNITED NATIONS, <http://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html> (last visited Aug. 30, 2017).

world's attention to human rights.²¹ Article 1 of the UDHR provides: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."²² A variety of subsequent international or regional instruments have confirmed and reinforced the universality of human rights that the U.N. Charter and the UDHR embodied.

Additionally, it is noteworthy that there are two international covenants of paramount importance, together with the UDHR in the realm of international human rights law. The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which were both adopted in 1966,²³ give legal effect to the terms of the UDHR and confirm the spirit of the United Nations' value of the universality of human rights through almost identical phrasing of their provisions. For example, the ICESCR states as follows:

The States Parties to the present Covenant . . . [r]ecogniz[e] that, in accordance with the Universal Declaration of Human Rights, the idea of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights, [and the parties] consider the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms.²⁴

As such, the concept of universal human rights has formed the basis for international human rights law for many international instruments since its initial establishment was based on international consensus through the adoption of the UDHR. Thus, the European Convention on Human Rights (ECHR) provides that signatory governments are obliged to respect the UDHR.²⁵

21. See CHRISTIAN TOMUSCHAT, *HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM* 58 (1st ed. 2003).

22. UNDHR, *supra* note 19, art. 1.

23. International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1966) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 (1966) [hereinafter ICESCR].

24. See ICESCR, *supra* note 23, at pmb1.

25. See European Convention for the Protection of Human Rights and Fundamental Freedoms, Apr. 11, 1950, C.E.T.S. No. 5 [hereinafter European Convention on Human Rights].

Moreover, the American Convention on Human Rights 1969 by and large reiterates part of the statement of the ICESCR cited above and substantially echoes it throughout the text.²⁶ Additionally, the Final Act, which was adopted at the Conference on Security and Co-operation in Europe in 1975—commonly known as the Helsinki Final Act—declares that one of the key principles guiding relations between participating states is the “respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief.”²⁷ This does not mean, however, that the concept of human rights is immune to ideological conflict. The aforementioned instruments still allow for consideration of cultural difference in their application. Furthermore, in the late 1920s, the diffusion of cultural diversity and the rise of state sovereignty challenged the belief that the universal value of human rights underlies all international human rights laws.²⁸

B. Freedom of Expression Guaranteed by International Instruments

Since the General Assembly of the United Nations adopted the UDHR at its third session in 1948,²⁹ the international community has joined together under both U.N. and regional human rights regimes to adopt treaties and resolutions to ensure that human rights receive universal protection across the world. A variety of international instruments guarantee freedom of expression as one of the key fundamental human rights. The fol-

26. Organization of American States, American Convention on Human Rights pmbl., Nov. 22, 1969, 1144 U.N.T.S. 123.

27. See Conference on Security and Co-operation in Europe Final Act (Aug. 1, 1975) [hereinafter Helsinki Final Act]. For more information on Helsinki Final Act, see DONNELLY, *supra* note 12, at 56, 95, 200–201.

28. See Anne Bayefsky, *Cultural Sovereignty, Relativism and International Human Rights: New Excuses for Old Strategies*, 9 *RATIO JURIS* 42, 47 (1996).

29. See *A Historical Record of the Drafting Process*, DAG HAMMARSKJOLD LIB., <http://research.un.org/en/undhr/introduction> (last visited Aug. 10, 2017).

lowing list notes the relevant provisions of key instruments: Article 19³⁰ and 29³¹ of the UDHR, adopted in 1948, Article 19³² and 20³³ of the ICCPR, adopted in 1966, Article 11³⁴ of the Charter of Fundamental Rights of the European Union, adopted in 2000, Article 10³⁵ of the European Convention for the Protection

30. See UDHR, *supra* note 19, art. 19 ("Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.").

31. See *id.* art. 29 ("1. Everyone has duties to the community in which alone the free and full development of his personality is possible. 2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. 3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.").

32. See ICCPR, *supra* note 23, art. 19 ("1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.").

33. See *id.* art. 20 ("1. Any propaganda for war shall be prohibited by law. 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.").

34. See Charter of Fundamental Rights of the European Union art. 11, 2000 O.J. (C 364) 1 ("1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. 2. The freedom and pluralism of the media shall be respected.").

35. See European Convention on Human Rights, *supra* note 25, art. 10 ("1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing

of Human Rights and Fundamental Freedoms, adopted in 1950, Article 13³⁶ and 14³⁷ of the American Convention on Human Rights, adopted in 1969, Article 9³⁸ of the African Charter on Human and Peoples' Rights, adopted in 1981, Article 11³⁹ of the

the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”).

36. See Organization of American States, American Convention on Human Rights art. 13, 1144 U.N.T.S. 123 (“1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice. 2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: (a) respect for the rights or reputations of others; or (b) the protection of national security, public order, or public health or morals. 3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions. 4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence. 5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.”).

37. See *id.* art. 14 (“1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish. 2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred. 3. For the effective protection of honor and reputation, every publisher, and every newspaper, motion picture, radio, and television company, shall have a person responsible who is not protected by immunities or special privileges.”).

38. See African Charter on Human and Peoples' Rights art. 9, Jun. 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (“1. Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law.”).

39. See The Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms art. 11, May 26, 1995, 3 I.H.R.R. 1, 212 (1996) (“1. Everyone shall have the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas by any legal means without interference by a public authority and regardless of frontiers. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions

Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms, adopted in 1995, and Article 30⁴⁰ of the Arab Charter on Human Rights, adopted in 1994 and amended in 2004.

Among these instruments, the UDHR and the ICCPR, components of the so-called International Bill of Human Rights, provide the legal basis for the protection of freedom of expression.⁴¹ Article 19 of the UDHR provides the foundation for the definition of freedom of expression. It provides: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."⁴² Article 19 of the ICCPR elaborates on principles set out in the UDHR.⁴³ Thus, it provides:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either

and restrictions as are prescribed by law and are necessary in a democratic society, in the interests of national security, public safety or public order or for the protection of the rights and freedoms of others.").

40. See League of Arab States, Arab Charter on Human Rights art. 30, amended May 22, 2004 ("1. Everyone has the right to freedom of thought, conscience and religion and no restrictions may be imposed on the exercise of such freedoms except as provided for by law. 2. The freedom to manifest one's religion or beliefs or to perform religious observances, either alone or in community with others, shall be subject only to such limitations as are prescribed by law and are necessary in a tolerant society that respects human rights and freedoms for the protection of public safety, public order, public health or morals or the fundamental rights and freedoms of others. 3. Parents or guardians have the freedom to provide for the religious and moral education of their children.").

41. The International Bill of Human Rights consists of the UDHR, ICCPR and ICESCR. See United Nations, PROTECT HUMAN RIGHTS, <http://www.un.org/en/sections/what-we-do/protect-human-rights/index.html> (last visited Nov. 20, 2015).

42. See UDHR, *supra* note 19, art. 19.

43. As of now, 169 states are parties to the ICCPR. See United Nations, Treaty Collection: Status of Treaties: Chapter IV Human Rights: 4. International Covenant on Civil and Political Rights (Dec. 16, 1966), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en.

orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.⁴⁴

General Comment No. 34 of the United Nations Human Rights Committee (“Human Rights Committee”) provides authoritative guidance for the interpretation and application of Article 19 of the ICCPR.⁴⁵

Scholars have described freedom of expression as the “touchstone of all rights.”⁴⁶ Necessitating this freedom is “the realization of the principles of transparency and accountability . . . essential for the promotion and protection of human rights.”⁴⁷ Furthermore, freedom of expression provides a basis for the full enjoyment of a wide range of other human rights, such as the rights to freedom of assembly and association and the right to vote.⁴⁸ According to Article 19 of the ICCPR, the freedom to seek, receive, and impart information and ideas of all kinds through any media and regardless of frontiers defines the right to freedom of expression. This freedom specifically includes “political discourse, commentary on one’s own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse, [and] commercial advertising” as part of that freedom.⁴⁹

The freedom to seek information and ideas includes active and investigative journalism of public interest.⁵⁰ The European Court of Human Rights (ECtHR) has traditionally interpreted the freedom to receive information as inclusive of the right of the

44. See ICCPR, *supra* note 23, art. 19.

45. See United Nations Human Rights Committee, General Comment 34, CCPR/C/GC/34 (Sept. 12, 2011).

46. See Kevin Boyle & Sangeeta Shah, *Thought, Expression, Association, and Assembly*, in INTERNATIONAL HUMAN RIGHTS LAW 217, 225 (Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran eds., 2nd ed. 2014).

47. See United Nations Human Rights Committee, *supra* note 45, ¶ 3.

48. See *id.* ¶ 4.

49. *Id.* ¶ 11.

50. See Boyle & Shah, *supra* note 46, at 226.

public to be informed and the duty of the media to impart information to the public.⁵¹ The ECtHR narrowly construed this freedom as prohibiting “the government from restricting a person from receiving information that others wish or may be willing to impart to him.”⁵² The court noted that the freedom to receive information should not be construed as imposing on the government “positive obligations” to collect and impart information to the public.⁵³ This court, however, has recently broadened the scope of the meaning of the freedom to receive information by interpreting it as generally inclusive of the government’s obligations to eliminate the information monopoly barrier created by the government and not to impede the flow of information sought by non-state actors, such as nongovernmental agencies or individuals.⁵⁴ Notably, information subject to the enjoyment of the freedom to impart information is not confined to that which has been clearly articulated or affirmatively expressed. This freedom extends to every form of information and idea expressed orally, in writing, or artistically.⁵⁵

The ICCPR does not afford explicit protection to the media. Nevertheless, given that the rights to freedom of opinion and expression constitute a cornerstone of democratic society, Article 19 should be interpreted as ensuring the media’s enjoyment of these rights.⁵⁶ The media acts as a watchdog for society, a vital role for democracy’s dynamic political process and interaction.⁵⁷ The press guarantees the healthy operation of democracy and facilitates citizens’ participation in the decision-making process.⁵⁸ Therefore, states should take effective measures to afford journalists an appropriate protection from threats, violence, or

51. See *Thorgeir Thorgeirson v. Iceland*, App. No. 13778/88, 14 Eur. H.R. Rep. 843, ¶ 63 (1992).

52. See *Leander v. Sweden*, App. No. 9248/81, 9 Eur. H.R. Rep. 433, ¶ 74 (1987); *Gaskin v. the United Kingdom*, App. No. 10454/83, 12 Eur. H.R. Rep. 36, ¶ 52 (1989); *Guerra and Others v. Italy*, App. No. 14967/89, 26 Eur. H.R. Rep. 357, ¶ 53 (1998) [hereinafter *Guerra*].

53. See *Guerra*, *supra* note 52, ¶ 53.

54. See PHILIP LEACH, EUROPEAN COURT OF HUMAN RIGHTS 378–379 (3rd ed. 2011). See also *Társaság a Szabadságjogokért v. Hungary*, App. No. 37374/05, 53 Eur. H.R. Rep. 130 (Apr. 14, 2009), ¶¶ 35–37.

55. See ICCPR, *supra* note 23, art. 19, ¶ 2.

56. See United Nations Human Rights Committee, *supra* note 45, ¶ 13.

57. See Boyle & Shah, *supra* note 46, at 227.

58. See D. J. HARRIS, M. O’BOYLE & C. M. BUCKLEY, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 640 (3rd ed. 2014).

other acts of harassment against freedom of expression.⁵⁹ It is noteworthy that the Human Rights Committee adopted a broad definition of journalists as “a wide range of actors including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet, or elsewhere.”⁶⁰ This definition created a higher threshold for the enjoyment of normative immunity by states from liability to ensure the enjoyment of freedom of expression by the press, as is necessary to properly perform its ordinary public function.

III. THE RELATIVE PROTECTION OF FREEDOM OF EXPRESSION

This Part will describe the relative nature of human rights by detailing the conflicting views regarding the relative protection of human rights, amidst general consensus of universal respect for human rights. Specifically, the cultural relativism approach adopted under the Bangkok Declaration, the San Jose Declaration, and the Tunis Declaration will be contrasted with the Western approach, which asserts that human rights are subject to absolute protection. This Part will continue by detailing how freedom of expression can be limited for various reasons, including the necessity of maintaining national security and public order, as demonstrated through a detailed discussion of *Norwood v. the United Kingdom* and *Robert Faurisson v. France*. Finally, this Part will conclude by engaging in a specific discussion on how freedom of expression may conflict with freedom of religion.

A. The Relative Nature of Human Rights

The 1993 Vienna World Conference on Human Rights (“Vienna Conference”) convened near the conclusion of the Cold War and spurred passionate debate among Member States of the United Nations on the universality of human rights.⁶¹ Before this conference, many developing countries had raised the issue of cultural diversity in Regional Meetings, where they adopted

59. See United Nations Human Rights Committee, *supra* note 45, ¶ 23.

60. *Id.* ¶ 44.

61. See Douglas Lee Donoho, *Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity within Universal Human Rights*, 15 EMORY INT’L L. REV. 391, 407 (2001).

three landmark declarations: the Bangkok Declaration, the San Jose Declaration, and the Tunis Declaration.⁶²

The Bangkok Declaration, as adopted at the Regional Meeting for Asia in April, 1993, announced that human rights “must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural, and religious backgrounds.”⁶³ The San Jose Declaration, adopted in the Regional Meeting for Latin America and the Caribbean in February 1993, recognized “the enormous contribution of indigenous people to the development and plurality of our societies and . . . the value and diversity of their cultures and their forms of social organization, without detriment to the unity of the State.”⁶⁴ Finally, the Tunis Declaration, adopted in the Regional Meeting for Africa in November 1992, proclaimed, “no ready-made model can be prescribed at the universal level [because] the historical and cultural realities of each nation and the traditions, standards and values of each people cannot be disregarded.”⁶⁵ Western countries, including the United States, denounced those declarations about cultural relativism, regarding them as threats to the validity of international human rights. Instead, these Western countries asserted the absolute universality of human rights.⁶⁶ At the Vienna Conference, Western countries argued that, although relativities and peculiarities of historical, cultural, and regional backgrounds might be factors

62. See U.N. Office of the High Commissioner for Human Rights, World Conference on Human Rights, 14–25 June 1993, Vienna, Austria, <http://www.ohchr.org/EN/ABOUTUS/Pages/ViennaWC.aspx> (Nov. 21, 2015).

63. See World Conference on Human Rights, *Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights*, ¶ 8, U.N. Doc. A/CONF.157/ASRM/8, A/CONF.157/PC/59 (Apr. 7, 1993), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G93/125/95/PDF/G9312595.pdf?OpenElement>.

64. See World Conference on Human Rights, *Final Declaration of the Regional Meeting for Latin America and the Caribbean of the World Conference on Human Rights*, ¶ 15, U.N. Doc. A/CONF.157/LACRM/15, A/CONF.157/PC/58 (Feb. 11, 1993).

65. See Regional Meeting for Africa of the World Conference on Human Rights in Tunis, Nov. 2–6, 1992, *Final Declaration of the Regional Meeting for Africa of the World Conference on Human Rights*, ¶ 5, U.N. Doc. A/CONF.157/AFRM/14, A/CONF.157/PC/57 (Nov. 24, 1992).

66. See Christian Cerna, *Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts*, 16 HUMAN RIGHTS QUARTERLY 740, 741 (1994).

for consideration, they did not justify the derogation of established international norms. After lengthy talks, supporters and opponents of the Bangkok, San Jose, and Tunis Declarations finally reached a compromise, known as the Vienna Declaration and Programme of Action (“Vienna Declaration”), which provides the following:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.⁶⁷

The Vienna Conference provided an arena for public discourse on how to balance the universality and relativity of human rights. The conference also represented a milestone in the formation of international agreements on the ambivalent attributes of human rights. To date, the Vienna Declaration produced from this conference constitutes the most significant global decision on human rights,⁶⁸ as numerous states and non-governmental organizations established a plan of action for securing the goal of universal respect and promotion of fundamental human rights, while also recognizing certain limitations such as cultural, social, and religious diversity.

B. Statutory Limits of Freedom of Expression

Unlike Article 19 of the UDHR, Article 19(3) of the ICCPR expressly allows for limitations upon freedom of expression. Under Article 19(3), the exercise of the right to freedom of expression “carries with it special duties and responsibilities [and] may be subject to certain restrictions.”⁶⁹ These limitations draw on Article 29(1) of the UDHR, which provides that “[e]veryone has duties to the community in which alone the free and full development of his personality is possible.” Only the legal necessity to respect the rights or reputations of others and the necessity to

67. See World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶ 5, U.N. Doc. A/CONF.157/23 (June 25, 1993).

68. See SMITH, *supra* note 19, at 51.

69. See ICCPR, *supra* note 23, art. 19, ¶ 3.

protect national security, public order, or public health or morals justify the restriction.⁷⁰

While Article 29(3) of the UDHR states that the right to freedom of expression may never run counter to "the purposes and principles of the United Nations," Article 20 of the ICCPR further restricts freedom of expression⁷¹ by criminalizing any speech that amounts to war propaganda and advocates national, racial, or religious hatred.⁷² Specifically, Article 20 provides that any advocacy of ethnic, racial, or religious hatred shall not be protected under the ICCPR when such hatred is to incite discrimination, hostility, or violence.⁷³ It is noteworthy that these restrictions are by and large analogous to ones set out in Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, which was adopted by the U.N. General Assembly in 1965.⁷⁴ Likewise, the United Nations Committee on the Elimination of Racial Discrimination states that "[t]he prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression."⁷⁵

Among a variety of substantive contents, discriminatory expression based on the ethnic origin is apt to invite fairly strict statutory limitations. Currently, both Islamophobia and anti-Semitism are widespread phenomena. The following two cases touch upon the issues of freedom of expression within those phenomena.

70. *Id.*

71. See United Nations Human Rights Committee, *supra* note 45, ¶ 50.

72. See ICCPR, *supra* note 23, art. 20. While the term "war" may be interpreted as "war of aggression," war propaganda was confirmed in the judgment by the Nuremberg war tribunal, which stated that war propaganda constituted an incitement to crimes against humanity. See Juhani Kortteinen, Kristian Myntti & Lauri Hannikainen, *Article 19, in THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT* 393, 404 (Gudmundur Alfredsson & Asjorn Eide eds., 1999).

73. See ICCPR, *supra* note 23, art. 20.

74. See International Convention on the Elimination of All Forms of Racial Discrimination art. 4, Mar. 7, 1966, 660 U.N.T.S. 195 ("States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination.").

75. Comm. on the Elimination of Racial Discrimination, General Recommendation XV on Article Four of the Convention No. 15, ¶ 4 (Mar. 17, 1993).

A right to freedom of expression may be fundamentally limited when it is exercised in a way to fuel Islamophobia. In *Norwood v. the United Kingdom*, the Oswestry Magistrates' Court in Britain convicted a member of the so-called British National Party, which was a radical right wing political party, of a crime of displaying hostility to a racial or religious group pursuant to section 5 of the Public Order Act of 1986.⁷⁶ The defendant, who acted as a regional organizer for that party, committed the crime by displaying a large poster containing a photograph of the Twin Towers in flames with the phrase "Islam out of Britain—Protect the British People" in the window of his dwelling and, even after the post was removed by the police, and continued to engage in discriminatory practices by displaying hostility to Islamic society through any writing, sign, or other visible representation.⁷⁷ Section 5 prohibits a person from purposefully or knowingly presenting any discernible form of description, portrayal, or statement in a public or private domain that is "threatening, abusive or insulting, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby."⁷⁸ The defendant's charge was found to constitute a statutorily aggravated offence according to sections 28 and 31 of the Crime and Disorder Act of 1998 (as amended by section 39 of the Anti-terrorism, Crime and Security Act of 2001), which provides that an offence under section 5 is "'racially or religiously aggravated' if it is 'motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group.'"⁷⁹ London's High Court dismissed Norwood's appeal, which claimed that convicting him would infringe upon his right to freedom of expression under Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁸⁰ The court stated that the poster, among others, in nature amounted to an overt expression of attack on the Muslim society as a whole on British soil.⁸¹ The ECtHR upheld the court's decision by stating that the applicant's display of the

76. See *Norwood v. the United Kingdom*, App. No. 23131/03, 40 Eur. H.R. Rep. 111, 2(2004) [hereinafter *Norwood v. the United Kingdom*].

77. *Id.*

78. *Id.* (citing section 5 of the Public Order Act of 1986).

79. *Id.* at 3 (citing sections 28(1)(b) and 31(1)(c) of the Crime and Disorder Act of 1998).

80. *Id.*

81. *Norwood v. the United Kingdom*, *supra* note 76, at 2.

poster constituted "vehement attack against a religious group" associating the Muslim society in its entirety with an act of terrorism.⁸² The ECtHR found this linkage incompatible with "the values proclaimed and guaranteed by the [European Convention on Human Rights], notably tolerance, social peace and non-discrimination."⁸³ Accordingly, the ECtHR held that the applicant's act fell within the meaning of Article 17 of the Convention, which could not enjoy the protection of Article 10.⁸⁴

Moreover, anti-Semitism may cause restraints on a right to freedom of expression. In *Robert Faurisson v. France*, the Seventeenth Chamber of the Court of the First Instance of Paris (17th Chambre Correctionnelle du Tribunal de Grande Instance de Paris) convicted a French historian of the crime of contesting the existence of the category of crimes against humanity under the "Gayssot Act," passed by the French legislature in 1990, which amended the law on the Freedom of the Press of 1881, when he made a comment denying the occurrence of the Holocaust and the Act constituted a threat to freedom of research and freedom of expression.⁸⁵ Crimes against humanity was "defined in the London Charter of 8 August 1945, on the basis of which Nazi leaders were tried and convicted by the International Military Tribunal at Nuremberg in 1945–1946."⁸⁶ The defendant contested the legitimacy of the Act by submitting that it was designed to "promot[e] the Nuremberg trial and judgment to the status of dogma, by imposing criminal sanctions on those who dare to challenge its findings and premises."⁸⁷ This conviction, however, was upheld by the Eleventh Chamber of the Court of Appeal of Paris.⁸⁸ The court found the lower court to have correctly evaluated in the light of Articles 6 and 10 of the European

82. *Id.* at 4.

83. *Id.* at 4.

84. *Id.*; European Convention on Human Rights, *supra* note 25, art. 17 ("Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.").

85. See U.N. Human Rights Committee, *Robert Faurisson v France*, paras. 2.3, 2.5, U.N. Doc. CCPR/C/58/D/550/1993 (Dec. 16, 1996) [hereinafter U.N. Human Rights Committee, *Robert Faurisson v France*].

86. U.N. Human Rights Committee, *Robert Faurisson v France*, *supra* note 85, ¶ 2.3.

87. *Id.*

88. *Id.* ¶ 2.7.

Convention of Human Rights and Fundamental Freedoms, which provides right to a fair trial and freedom of expression, respectively.⁸⁹ This implies that the court viewed the act of the defendant as falling outside of the legitimate right to freedom of expression, as Article 10 of the Convention subjects such freedom to restrictions “as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, . . . for the protection of the reputation or rights of others, . . . or for maintaining the authority.”⁹⁰ While the defendant filed a complaint at the Human Rights Committee by arguing that the court’s ruling infringed upon his freedom of expression, the Committee held that Article 19 of the ICCPR justified the conviction as a reasonable interference with freedom of expression.⁹¹ The Committee stated that the complainant instigated anti-Semitism through his publications and comments by “seek[ing] to accuse the Jewish people of having falsified and distorted the facts of the Second World War and thereby having created the myth of the extermination of the Jews.”⁹² The Committee found this act to constitute a violation of Article 20 of the Covenant in the sense that such an act amounted to “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”⁹³ According to the Committee’s decision, the complainant’s act was to encroach on human rights of the Jewish people and therefore he could not invoke a right to freedom of expression under Article 19 of the Covenant because Article 5 of the Covenant precludes any group or individual from enjoying and exercising “any right to engage in activities aimed at the destruction of any of the rights and freedoms recognized in the Covenant.”⁹⁴

The traditional discourse on the restriction of freedom of expression also sheds light on an issue of criticism of a religion. People who hold particular religious beliefs and convictions may

89. *Id.*

90. See European Convention on Human Rights, *supra* note 25, art. 10.

91. U.N. Human Rights Committee, *Robert Faurisson v France*, *supra* note 85, ¶ 6.1. See ICCPR, *supra* note 23, art. 19.

92. U.N. Human Rights Committee, *Robert Faurisson v France*, *supra* note 85, paras. 7.4–7.5.

93. See ICCPR, *supra* note 23, art. 20.

94. See ICCPR, *supra* note 23, art. 5; U.N. Human Rights Committee, *Robert Faurisson v France*, *supra* note 85, ¶ 7.4.

be offended by expressions of others that they find blasphemous. For example, the aforementioned Danish Cartoon controversy sparked serious public and scholarly debate about the extent to which Islamic law may protect freedom of expression.⁹⁵ A series of incidents (including that of the Danish Cartoon) led to worldwide protest by Muslims; and, eventually in 2008, the Human Rights Council of the United Nations (former Commission on Human Rights) and the General Assembly respectively adopted resolutions on the restriction of freedom of expression in order to address the defamation of religions.⁹⁶

It is noteworthy that the Human Rights Council adopted another resolution with promising language in October 2009, four months after U.S. President Barack Obama's Cairo speech, which emphasized the United States' responsibility to counter negative stereotypes of Islam.⁹⁷ Introduced by the United States and Egypt, this resolution does not refer to defamation of religion. Rather, it affirms the rights of individual speech and of the press and "highlight[s] the importance of those rights in fostering democratic society and combating intolerance, [emphasizing] the international legal obligation to respect those rights."⁹⁸ This resolution, however, recognizes "the moral and social responsibilities of the media . . . [to] combat racism, racial discrimination, xenophobia, and related intolerance."⁹⁹ It, furthermore, expresses its concern over the worldwide rise of "negative racial and religious stereotyping" and condemns "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence," as provided in Article 20 of

95. See ISLAMIC LAW AND INTERNATIONAL HUMAN RIGHTS LAW: SEARCHING FOR COMMON GROUND? 121 (Anver M. Emon, Mark S. Ellis & Benjamin Glahn eds., 1st ed. 2012).

96. See G.A. Res. 62/154, Combating Defamation of Religions (Mar. 6, 2008); Human Rights Council Res. 7/36, U.N. Doc. A/HRC/RES/7/36 (Mar. 28, 2008).

97. See Human Rights Council Res. 12/16 U.N. Doc. A/HRC/RES/12/16 (Oct. 2, 2009).

98. See John B Bellinger III & Murad Hussain, *Freedom of Speech: The Great Divide and the Common Ground Between the United States and the Rest of the World*, in ISLAMIC LAW AND INTERNATIONAL HUMAN RIGHTS LAW: SEARCHING FOR COMMON GROUND? 168, 178–179 (Anver M. Emon, Mark S. Ellis & Benjamin Glahn eds., 1st ed. 2012); Press Release, U.N. Human Rights Council, Human Rights Council Adopts Six Resolutions and One Decision on Discrimination Against Women and Freedom of Expression, Among Others (Oct. 2, 2009), <http://reliefweb.int/report/myanmar/human-rights-council-adopts-six-resolutions-and-one-decision-discrimination-against>.

99. See Human Rights Council, *supra* note 97, ¶ 8.

the ICCPR.¹⁰⁰ Hence, the resolution exhorts States to take necessary and effective measures to address such concern.¹⁰¹

Adopting a new epoch-making resolution in 2011, the Human Rights Council shifted away from the idea of “combating defamation of religions” in favor of protecting religious believers from intolerance and violence.¹⁰² This approach seems to be based on the proposition that it is not the religion itself but religious believers that ought to be protected in the name of freedom of religion by international human rights law.¹⁰³ Accordingly, “blasphemy laws” aiming to penalize the mere defamation of or disrespect for a specific religion, if any, are incompatible with the right to freedom of expression under the ICCPR.¹⁰⁴ Blasphemy laws in more than seventy countries across the world have been criticized as a government tool for persecuting freedom of religion under the purported pretext to safeguard religions against defamation.¹⁰⁵ The 2017 Annual Report of the U.S. Commission on International Religious Freedom shows that those countries retaining legislation on blasphemy include China, Iran, Nigeria, Pakistan, Russia, Saudi Arabia, Sudan, Afghanistan, Egypt, Indonesia, Bangladesh, and many Western European countries, such as Austria, Denmark, France, Germany, Ireland, and Italy, although those European countries have seldom enforced blasphemy laws.¹⁰⁶ For instance, Pakistan’s Penal Code remains the best example of blasphemy laws

100. *Id.* ¶ 4.

101. *Id.*

102. See Human Rights Council Res. 16/18, U.N. Doc. A/HRC/RES/16/18 (Mar. 24, 2011); Boyle & Shah, *supra* note 46, at 231. See also Robert Evans, *Islamic Bloc Drops 12-year U.N. Drive to Ban Defamation of Religion*, REUTERS (Mar. 24, 2011), <http://blogs.reuters.com/faithworld/2011/03/24/islamic-bloc-drops-12-year-u-n-drive-to-ban-defamation-of-religion/>.

103. See Evans, *supra* note 102; Boyle & Shah, *supra* note 46, at 231.

104. See United Nations Human Rights Committee, *supra* note 45, ¶ 48 (stating that blasphemy laws are impermissible in that they “discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers [and] prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith”).

105. U.S. COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, 2017 ANNUAL REPORT 2 (Apr. 2017), at <http://www.uscirf.gov/reports-briefs/annual-report/2017-annual-report>.

106. U.S. COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, *supra* note 105, at 34, 48, 54, 62, 71, 76, 84, 121, 144, 160, 192, 212.

based on the Islamic doctrine.¹⁰⁷ Sections 295 and 298 of the Code “criminalize acts and speech that insult a religion or religious beliefs or defile the Qur’an, the Prophet Muhammad, a place of worship, or religious symbols.”¹⁰⁸ Those sections are susceptible to abuse and false accusations, as they do not require any proof of blasphemous conduct.¹⁰⁹ The Report indicates that a number of individuals, the majority of which falls within the religious minority communities other than Muslims, have been sentenced to death or are still serving life sentences for blasphemy charges.¹¹⁰ In General Comment No. 34, the Human Rights Committee confirmed the incompatibility of blasphemy laws with the right to freedom of expression, stating that the ICCPR did not prohibit “displays of lack of respect for a religion or other belief system” unless they went beyond the mere silent manifestation of personal aversion or dislike and amounted to the public revelation of religious repugnance or abhorrence that instigated discrimination, hostility or violence as provided for in Article 20.¹¹¹ This meant that the Committee avowedly reaffirmed the global consensus reflected in the 2011 resolution on the importance of redrawing the line between the rights to freedom of expression and freedom of religion. In short, the 2011 resolution seems to be the work of normative significance in the sense that it admits to “legitimate criticism of religion or [religious] belief” and clarifies that freedom of expression may be limited in the context of respect for religions.¹¹² For this reason, some say that this resolution is “a huge achievement because . . . it focuses on the protection of individuals rather than religions.”¹¹³

107. See Reuters Staff, *Factbox-Pakistan's Blasphemy Law Strikes Fear in Minorities*, REUTERS (Mar. 2, 2011), <http://blogs.reuters.com/faith-world/2011/03/02/factbox-pakistans-blasphemy-law-strikes-fear-in-minorities>.

108. U.S. COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, *supra* note 105, at 62.

109. *Id.*

110. *Id.*

111. United Nations Human Rights Committee, *supra* note 45, ¶ 48.

112. See International Federation for Human Rights, *UN: Defending the Universality of Human Rights-Priority #HRC29* (Jun. 15, 2015), <https://www.fidh.org/en/international-advocacy/united-nations/un-defending-the-universality-of-human-rights-priority-hrc29> (last visited Oct. 14, 2015).

113. See Press Release, Human Rights First, *Groundbreaking Consensus Reached to Abandon Global Blasphemy Code at the United Nations* (Mar. 24,

IV. DISCOURSE ON THE RELATIVE UNIVERSALITY OF HUMAN RIGHTS

This Part will provide a detailed analysis of cultural relativism, which functions as the governing approach to determine how the bounds of freedom of expression human rights should be assessed. This Part will subsequently suggest the “social integrity” standard to evaluate whether the cultural relativism approach is admissible. It will provide a profound discussion of the identity politics and present the significance of the social integrity standard that serves as a general normative base for the evaluation of the scope of absolute protection of human rights in a multicultural global community. Finally, this Part will also examine the key questions raised from the application of the social integrity standard.

A. Cultural Relativism

Two concepts of universalism and absolutism in the context of discourse on human rights are often interchangeably used, but they must be semantically distinguished from each other. Absolutism means that human rights are subject to the strict application of uniform governing norms which completely deny exceptional deviation from them. By contrast, universalism in a broad sense simply captures the theory that human rights are the same everywhere.¹¹⁴ Thus, it implies that human rights are in scope and substance common to everyone across the world, but allows for certain restraints on human rights on the ground of the protection of social virtues superior to human rights such as national security and public order, as thoroughly examined in Part III. Granting that a bright line between those two concepts can be drawn, universalism in a narrow sense still seems to be used as a substitute for absolutism. Considering its general familiarity and usage in practice, the term of universalism shown in the following discussion in Part IV is interpreted as referring to absolutism so long as it is used in the context of being contrasted with cultural relativism.

2011), <http://www.humanrightsfirst.org/press-release/groundbreaking-consensus-reached-abandon-global-blasphemy-code-united-nations>.

114. See Mark S. Ellis, *Islamic and International Law: Convergence or Conflict?*, in *ISLAMIC LAW AND INTERNATIONAL HUMAN RIGHTS LAW: SEARCHING FOR COMMON GROUND?* 91, 97 (Anver M. Emon, Mark S. Ellis & Benjamin Glahn eds., 1st ed. 2012).

One of the main challenges to the universality of human rights lies within cultural relativism based upon a premise that there exists plural cultures which are not identical to one another.¹¹⁵ Universalism has caused controversy in non-Western societies, where people may consider and apply concepts of justice and human rights differently than people in Western societies.¹¹⁶ Almost half a century after the adoption of the UDHR, discussion over the issue of universality versus relativity has raised the question as to what extent cultural relativism may legitimately modify the rule of a minimum standard valid for all.¹¹⁷

Relativists contend that, “[t]o the Universalist, [human] rights are contingent entirely on their substance, not on where they came from and where they are being applied.”¹¹⁸ In response, moderate Universalists acknowledge that universal rights may be interpreted differently and applied in different cultures with good reason.¹¹⁹ Moderate Universalists stress, however, that “although the right will be contingent upon culture as a matter of application, it is the particular nature of that right that determines how this should be done.”¹²⁰

But, in the debate between universality and relativity, which theoretical framework is appropriate to understand the attribute of human rights? It should be noted that cultural and religious traditions differ as to their understanding of what fundamental rights are. It is obviously necessary to acknowledge that the rights to freedom of expression and freedom of religion sometime clash.¹²¹ This conflict, however, cannot imply the rejection of the universal applicability of human rights law or deny the

115. See SMITH, *supra* note 19, at 50.

116. See Kathleen Cavanaugh, *Narrating Law*, in ISLAMIC LAW AND INTERNATIONAL HUMAN RIGHTS LAW: SEARCHING FOR COMMON GROUND? 17, 24–25 (Anver M. Emon, Mark S. Ellis & Benjamin Glahn eds., 1st ed. 2012).

117. See respectively JACK DONNELLY, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400 (1984); BURNS H. WESTON, *Human Rights and Nation-Building in Cross-Cultural Settings*, 60 ME. L. REV. 317 (2008) [hereinafter WESTON, *Nation-Building in Cross-Cultural Settings*]; BURNS H. WESTON, *The Universality of Human Rights in a Multicultural World: Toward Respectful Decision-Making*, in THE FUTURE OF INTERNATIONAL HUMAN RIGHTS 65, 66 (Burns H. Weston & Stephen P. Marks eds., 1999).

118. See Ellis, *supra* note 114, at 97.

119. *Id.*

120. *Id.*

121. See Natan Lerner, *Religious Human Rights Under the United Nations*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: PART 2 79, 130 (Johan D. van der Vyver & John Witte, Jr. eds., 1996).

need for a minimum international standard for human rights dynamics.¹²² A “constructive approach” may provide a solution for this complex puzzle. This approach suggests neither “under-estimat[ing] the challenge of cultural relativism to the universality of human rights nor conced[ing] too much to [cultural relativism] claims.”¹²³

The late eminent legal scholar Burns H. Weston emphatically notes that “any human rights orientation that is not genuinely in support of the widest possible embrace of the value of respect in the making and enforcement of human rights norms in a multicultural world is likely to provoke widespread skepticism if not unreserved hostility.”¹²⁴ He further stresses the cross-cultural challenge to universalism:

First, not all states, certainly not all “relativist” states, have ratified even some of the core international human rights instruments, thus thwarting the *pacta sunt servanda* argument *ab initio* in many if not most instances of relativist-universalist contestation. . . . Second, while many cultures share common values, much of international human rights law, particularly as it relates to such “first generation” or “negative” rights as are reflected in the ICCPR, may be said to be Western inspired, thus fueling the conflict rather than resolving it. . . . Third, all human rights instruments are filled with ambiguity and indeterminacy, sometimes deliberately to ensure signature and ratification. . . . Finally, when their plenipotentiaries are not signing or voting for human rights resolutions and treaties “as mere gestures for temporary public relations purposes,” states, including those that profess the universality of human rights, typically hedge their bets by resort to reservations, statements of understanding, and declarations so as to ensure that certain practices deemed central to their legal or other cultural traditions will not be rendered unlawful or otherwise anachronistic.¹²⁵

Cultural relativism hardly constitutes an obvious legal concept; rather, it originates from the intersection of anthropology and philosophy.¹²⁶ Hence, construing cultural relativism does

122. *Id.*

123. See ABDULLAHI AHMED AN-NA’IM, HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 3 (1995).

124. WESTON, *Nation-Building in Cross-Cultural Settings*, *supra* note 117, at 326.

125. *Id.* at 326–328.

126. See Cavanaugh, *supra* note 116, at 25.

not simply invite a technical application of stereotyped standards but requires factual inquiries into multicultures of different values and origins under the approach between empirical analysis and transcendental cognition. This concept, however, does not exist in a vacuum. Jack Donnelly, a renowned scholar in international studies, argues that cultural relativism is contemplated and applied in a plain manner. He stresses that there are “a set of doctrines that imbue cultural relativity with prescriptive force.”¹²⁷ The 1947 Statement on Human Rights of the American Anthropological Association states that “man is free only when he lives as his society defines freedom.”¹²⁸ Contemporary society is not prone to represent a single culture. Various cross-border cultures are integrated into the identical society. The coexistence of disparate cultures restricts a pattern of behavior of social members. With this recognition, the current global climate attempts to celebrate cultural divergence and heterogeneity.¹²⁹ As part of the global mandate to promote cultural diversity across the world, the United Nations Educational, Scientific, and Cultural Organization adopted the Universal Declaration on Cultural Diversity at the General Conference for its thirty-first session in Paris on November 2, 2001.¹³⁰ The Declaration is the first international instrument reflecting the global consensus on cultural diversity.¹³¹ Article 1 of the Declaration states that “cultural diversity is as necessary for humankind as biodiversity is for nature . . . [thus] it is the common heritage of humanity and should be recognized and affirmed for the benefit

127. See Jack Donnelly, *International Human Rights: Universality, Relative or Relatively Universal?*, in *INTERNATIONAL HUMAN RIGHTS LAW: SIX DECADES AFTER THE UDHR AND BEYOND* 31, 43 (Mashood A. Baderin & Manisuli Ssenyonjo eds., 2010).

128. American Anthropological Association, 49 *American Anthropologist* 539, 543 (1947) <http://anthrosource.onlinelibrary.wiley.com/hub/issue/10.1111/aman.1947.49.issue-4/>.

129. See SMITH, *supra* note 19, at 51.

130. United Nations Educational, Scientific and Cultural Organization, UNITED NATIONS EDUCATIONAL, SCIENTIFIC, AND CULTURAL ORGANIZATION [hereinafter UNESCO], *Universal Declaration on Cultural Diversity* (Nov. 2, 2001), http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html.

131. UNESCO, CULTURAL DIVERSITY SERIES NO. 1, UNIVERSAL DECLARATION ON CULTURAL DIVERSITY: A VISION, A CONCEPTUAL PLATFORM, A POOL OF IDEAS FOR IMPLEMENTATION, AND A NEW PARADIGM 3 (2002), <http://unesdoc.unesco.org/images/0012/001271/127162e.pdf>.

of present and future generations.”¹³² The Declaration defines cultural diversity as being “embodied in the uniqueness and plurality of the identities of the groups and societies” and being guaranteed by “a commitment to human rights and fundamental freedoms.”¹³³ It emphasizes the sustainability of cultural diversity by recognizing the indivisibility of culture and development.¹³⁴ Thus, it states that cultural diversity is “the key to sustainable human development,” “not simply in terms of economic growth, but also as a means to achieve a more satisfactory intellectual, emotional, moral and spiritual existence.”¹³⁵ More importantly it should be noted that the Declaration makes it clear that the defense of cultural diversity is “inseparable from respect for human dignity.”¹³⁶ Thus, this is understood as implying that for the preservation of cultural diversity it is imperative to respect “human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples.”¹³⁷ Further to the adoption of the Universal Declaration on Cultural Diversity, the U.N. General Assembly, in its Resolution 57/249 in 2003, proclaimed the 21th of May as World Day for Cultural Diversity for Dialogue and Development.¹³⁸

As Donnelly explains, by the degree of relativity cultural relativism in a broad sense is divided into three types: radical cultural relativism, strong cultural relativism, and weak cultural relativism. According to radical cultural relativism, a region’s culture is the origin of all human rights values. This concept rejects the idea that human rights are independent from society.¹³⁹ Thus, radical cultural relativism holds that a “human being” itself lacks moral value, and, therefore, the fundamental rights of

132. Universal Declaration on Cultural Diversity, *supra* note 130, art. 1.

133. *Id.* arts. 1, 4.

134. *Id.* art. 3.

135. *Id.* arts. 3, 11.

136. *Id.* art. 4.

137. *Id.*

138. G.A. Res. 57/249, Culture and development, ¶ 4 (Feb. 20, 2003); See *World Day for Cultural Diversity for Dialogue and Development / 21 May*, UNITED NATIONS, <http://www.un.org/en/events/culturaldiversityday/> (last visited Sept. 13, 2017).

139. See JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 109 (1st ed. 1989).

a "human being" (i.e. human rights) are value neutral.¹⁴⁰ Accordingly, the value of human rights takes different shapes in different societies and, therefore, is not universally construed beyond societal boundaries. That is to say, radical cultural relativism does not admit to so-called transsocietal human rights. Strong cultural relativism, however, relies on the idea that culture is the most significant but is not the sole element that gives moral rights or rules meaningful value.¹⁴¹ This concept suggests that universal standards of human rights are useful only when the standards function as the key check on excessive relativity.¹⁴² Therefore, the concept of strong cultural relativism concerns a small number of rudimentary rights—the universal respect for which is substantively available—and a large majority of rights that subject themselves to relative respect.¹⁴³ Finally, weak cultural relativism relies on the universality of human rights but recognizes the functional significance of such concepts as the nature of humanity, the attributes of social community, and the relativity of individual rights as the key check on excessive universality.¹⁴⁴ Therefore, weak cultural relativism admits to universal human rights—even if its degree of universality does not amount to that of radical universalism—while rigorously restricting the exceptions of regional diversity and peculiarity.¹⁴⁵ In other words, weak cultural relativism allows for broader discretion than radical and strong relativism to judge that a certain action falls outside of what is considered protected behavior and infringes on contemporary human rights norms.

On the one hand, cultural relativism appears to criticize the problem of radical universality based on the universality of human rights. It may properly check the establishment of perilous moral imperialism that requires every individual moral community to abide by a global uniform standard of morality and deny the autonomy and self-determination of ethnic and quasi-ethnic morals. On the other hand, cultural relativism appears vulnerable to the slippery slope argument, which suggests that the denial or exclusion of the universality of human rights, due to the

140. *Id.* at 99–100.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 100.

145. *Id.*

excessive emphasis of cultural relativism, may lead to the ultimate dissolution of universal value of human rights.

In any case, human rights should be universally respected, even if they are subject to relative protection under cultural relativism. The conceptual underpinnings of human rights are both universal and relative. Hence, a far-fetched argument that the accumulated facts of history show that the current regime of universal human rights has often been used to bolster Western cultural dominance is no more or less the misconception of Universalism.¹⁴⁶ This misconception merely comes from a universality-biased understanding of the issue. A more holistic analysis of human rights in the context of cultural relativism calls upon the global community to maintain universal respect for human rights and vigilantly check the rise of moral imperialism.

B. The “Social Integrity” Standard for the Evaluation of Normative Admissibility of Cultural Relativism

It is self-evident that the global community should universally respect human rights. The corollary, however, does not require that the global community absolutely protect them under all circumstances. Human rights are subject to statutory limitations and challenges of cultural relativism. Long-standing debates over cultural relativism remain controversial. In particular, discourse on cultural relativism in the context of international human rights law has raised a difficult question, that is, “to what extent should cultural relativism serve as a controlling norm to restrict the absolute protection of human rights?” Absent easy answers to this question, Donnelly’s hypothesis provides useful guidance with a new paradigm for understanding human rights.¹⁴⁷ This paradigm prompts us to explore the content, reach, and bounds of human rights on the basis of a three-step approach: first, understand the substantive meaning of human rights; second, interpret specific human rights; and third, resolve how to honor and implement these rights.¹⁴⁸ Donnelly notes that at the first step, cultural diversity scarcely justifies any derogation of the universality of human rights.¹⁴⁹ Further, he explains that, while cultural diversity constitutes exceptional

146. See Ellis, *supra* note 114, at 97.

147. See JACK DONNELLY, INTERNATIONAL HUMAN RIGHTS 45 (4th ed. 2013).

148. *Id.* at 37.

149. *Id.*

justification at the second step, there is substantial room for favorable consideration of cultural diversity at the third step.¹⁵⁰ Thus, his hypothesis holds that acknowledgment of the challenges of cultural relativism has a role in interpreting and applying specific human rights.

Cultural relativism does not require evaluation of whether the culture is compatible with public order and social mores, as the global community has generally accepted. This concept requires evaluation of the significance and value of culture in the society and how the culture has contributed to the internal integration of society; cultural relativism implies that human rights may not be subject to complete protection in the society where the culture strongly resists limitless enjoyment and exercise of human rights because such protection is at odds with the fundamental integrity of that society.

The term of social integrity, as a key standard for the evaluation of the normative admissibility of cultural relativism in human rights discourse, does not exist in a vacuum. This concept is derived from discourse on identity politics. Identity politics is based on the notion that "identity claims do represent a legitimate form of political discourse [in society]."¹⁵¹ Margaret Moore, a renowned scholar in political studies, notes that the concept of identity generally performs three key functions in the context of intra-societal group relations: "membership, differentiation and a subjective or inner identification."¹⁵² Specifically, membership to a particular group denotes that personal identity exposes one to others at the initial step of the relation-building process.¹⁵³ Differentiation means that "[personal] identity form[ing] in contrast to others" reinforces the sense of membership.¹⁵⁴ A subjective or inner identification implies that "[personal] identity exists as a subjective or internalized perspective of what makes one's life intelligible and meaningful."¹⁵⁵ Moore further explains that "[personal] identity is linked with one's sense of self, or one's

150. *Id.*

151. See Margaret Moore, *Identity Claims and Identity Politics: A Limited Defence*, in *IDENTITY, SELF-DETERMINATION AND SECESSION* 27, 38 (Igor Primoratz & Aleksandar Pavkovic eds., 2006).

152. *Id.* at 28.

153. *Id.*

154. *Id.*

155. *Id.* at 28–29.

integrity as a person.”¹⁵⁶ Therefore, “enforcing rules and policies that violate people’s identity, or require people to act contrary to what they regard as central to their sense of self” calls for careful attention.¹⁵⁷ This notion of personal identity applies to so-called collective identity—the identity embodied by society.¹⁵⁸ That is, collective identity is integral to the society or its members as a whole, not to the individual. It is noteworthy that collective identity matters in inter-societal group relations as personal identity generally does in intra-societal group relations.

The modern societal scramble for hegemony precipitates one of the problems of identity politics. A sharp ideological conflict between the East professing socialism and the West advocating liberal democracy characterized the Cold War era. This fight for hegemony—not unprecedented but still far-reaching—foreshadowed the clash between the two contrasting identities deeply rooted in the East and the West. The victory of Western hegemony completely shattered the collective identity integral to Eastern society. The wide diffusion of identity politics that emerged after the collapse of the Cold War regime posed a significant challenge to Western-oriented culture—underlying a contemporary new world order underpinned by neoliberalism and liberal democracy—based on globalization, individualism, and consumptive capitalism, which are predicated upon human rights of universal quality.¹⁵⁹ The mode of behaviors by which identity politics manifest themselves may vary from the nonviolent protests of Martin Luther King Jr.¹⁶⁰ to radical exclusivism and violence of the Islamic State of Iraq and Syria, also known as ISIS.

156. *Id.* at 29.

157. *Id.*

158. *Id.* at 31.

159. It is noteworthy that the concept of “liberal democracy” is susceptible to various interpretations. A critical view indicates that this concept raises the so-called “authoritarian opinion” concern in that extremely biased liberal democracy overstressing the significance of public consensus may take on totalitarianism that forbids not being a democrat. See ALAIN BADIOU, *METAPOLITICS* 78 (Jason Barker trans., 1st ed. 2005), cited in Alessandro Zagato, *Imagination of Violence and Surrogates for Politics*, in *THE EVENT OF CHARLIE HEBDO: IMAGINARIES OF FREEDOM AND CONTROL* 43, 44 (Alessandro Zagato ed., 1st ed. 2015).

160. On August 28, 1963, Martin Luther King Jr. pursued his great dream that “[all men would] not be judged by the color of their skin but the content of their character.” See Martin Luther King Jr., “I Have a Dream” Speech Delivered at the Lincoln Memorial in Washington D.C. (Aug. 28, 1963).

The bottom line, however, is that, in identity politics, context such different modes of behaviors may be, at their core, considered attempts by social groups to secure their identities by fighting against Western cultural dominance.

It should be noted that identity politics may have a semantic link to decolonization. Details may blur the distinction between identity politics and decolonization. The expansion of the concept of identity politics to the traditional history of power politics may state that the collective manifestation of common sovereign rights of indigenous peoples in colonial countries in the form of aggregated identity claims has contributed to gradual demise of global imperialism on a regional or worldwide basis. This notion is based on an understanding that identity politics is construed as including the invocation of individual sovereign rights or national sovereign power. Indeed, it seems that there in nature exists an overlap between decolonization and identity politics in that the former represents the restoration of common identity characterized as national sovereignty, which remains under the suppression of dominant colonial power while the latter reflects public backlash against coerced, strict conformity to uniform identity and promotes the social integration based on heterogeneous interests emerging in the contemporary era of diverse identity. Here, it is noteworthy that Articles 73 and 74 of the U.N. Charter recognize that the interests of the inhabitants of [dependent] territories are paramount, and bind all U.N. Member States to obligations to promote the well-being of those inhabitants in political, social, economic, educational, and commercial matters and particularly assist them in developing self-government to establish free political institutions.¹⁶¹ For the progressive development of this decolonization mandate, the U.N. General Assembly adopted, in 1960, the Declaration on the Granting of Independence to Colonial Countries and Peoples, commonly known as the Declaration on Decolonization.¹⁶² It proclaims that all people have the right to self-determination and the right to complete independence, which are all embraced by equal fundamental human rights as affirmed in the U.N. Charter and the UDHR.¹⁶³ The right to self-determination ensures that all people “freely determine their political status and freely

161. See U.N. Charter arts. 73–74.

162. G.A. Res. 1514 (XV) (Dec. 14, 1960).

163. *Id.*; U.N. Charter art. 1; UDHR, *supra* note 19.

pursue their economic, social and cultural development . . . on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.”¹⁶⁴ Thus, from a contextual perspective, it can be said that “the principles of equal rights and self-determination” underlying decolonization movements represent the virtue analogous to the one pursued by identity politics, which is described as aiming at simulating people to free themselves from the shackles of the universal obtrusion of rigid standardized identity, in other words, motivating them to resist the governing regime denying the coexistence of diverse identities that play a pivotal role in connecting people with the same identity to one another. In short, the common locomotive value driving both identity politics and decolonization leads to the collective defiance by the underrepresented and suppressed people against the collective obliteration of human rights to the diverse identity, respectively. This implication, however, cannot be interpreted as overstating the conceptual relationship between identity politics and decolonization. They cannot be understood as serving a corollary to each other. From a sociopolitical perspective, the former concept originates in the discourse on inter- or intra- societal relations background and by contrast the latter necessarily invites discussions of the legitimate sovereign rights and national sovereign power within the meaning of public international law.

Today it seems no more controversial that inter-societal group conflict of heterogeneous identities in the context of international relations is not an issue of right or wrong, but one of tolerance of different peoples’ identities. French philosopher Voltaire stresses throughout one of his influential books, “Treaties on Tolerance,” that the spirit of tolerance calls upon the public to recognize that all humans have different commitments and identities deserving of equal respect.¹⁶⁵ As Moore puts it, constructive discussion for dissolution of identity conflict should not “admit of the kind of zero-sum relation [between social groups with different identities] that critics argue is a central feature of identity politics.”¹⁶⁶ Thus, the appropriate form of identity claim

164. G.A. Res. 1514 (XV), *supra* note 162.

165. VOLTAIRE, *supra* note 1.

166. *See* Moore, *supra* note 151, at 39.

must not employ an extreme form of practice of excluding a social group with a heterogeneous identity from the common community in the name of cultural relativism. This reflects no more than the radical cultural relativism and fall afoul of the principle of live-and-let-live. The exploration of a just and ideal doctrine to ensure the coexistence of diverse identities and universal respect for human rights boils down to the relative universality of human rights. Under this overarching doctrinal umbrella, the degree of the practice of exercising human rights is precluded from going beyond minimum limitation standards, which are determined or ascertained through the process of reaching a national or international consensus as to the legitimate scope of human rights, for example as set out in various international instruments introduced in Part III. It is noteworthy that social justice serves as a legitimate standard in embodying the relative universality of human rights in the capacity of a good supplement to normative limitations, which were set forth in those instruments and established in the case law. In his magisterial work titled "A Theory of Justice," John Rawls, the late renowned contemporary political philosopher, provides a lucid articulation of his profound intuition on what social justice calls upon citizens in a free society to do.¹⁶⁷ He acknowledges that individual liberty and fundamental rights may be subject to limitations derived from the principle of the common interest in public order and security.¹⁶⁸ He conceptualizes the common interest as the "interest of the representative equal citizen."¹⁶⁹ In other words, he explains that these limitations do not imply that public interests are placed over liberty and individual interests.¹⁷⁰ Rather, he stresses that from a contractual standpoint, the government as the citizens' agent is to have been endowed with an enabling right to maintain public order and security, which was necessary to accomplish its duty to ensure the establishment of fair, well-ordered society for every citizen's pursuit of his individual interests and well-being.¹⁷¹ Rawls bases restraints of human rights of others, especially the intolerant sects on the principle of justice as "a just constitution with the liberties of equal citizenship" which is characterized as "the end of political action by reference

167. JOHN RAWLS, A THEORY OF JUSTICE 216-221 (1971).

168. *Id.* at 212-213.

169. RAWLS, *supra* note 167, at 213.

170. *Id.* at 212.

171. *Id.* at 212-213.

to which practical decisions are to be made.”¹⁷² The principle of justice endows just citizens with a legitimate right to self-preservation, allowing for deviation from the complete tolerance of others.¹⁷³ Therefore, tolerant citizens in well-ordered just society have “the right not to tolerate the intolerant . . . when they sincerely and with reason believe that intolerance is necessary for their own security.”¹⁷⁴ Conversely, the intolerant’s freedom to invoke tolerance is fundamentally restricted by the existence of the imminent danger to both social security and equal liberties of other tolerant citizens.¹⁷⁵

Notably, the aforementioned discussions underpin the significance of the social integrity standard that serves as a general normative base for the evaluation of the scope of absolute protection of human rights in a multicultural global community. Thus, cultural relativism takes concrete shape within the concept of social integrity. This concept may have anti-Western or dictatorial overtones in some sense. Historically speaking, men in power without general public support have invoked social integrity as a justification for human rights violations. Consider, for example, how South Korea committed massive and nationwide human rights violations that were in the name of social assimilation and cohesion rampant under “the military-backed, authoritarian regimes” from the late 1940s to the late 1980s, until civil protests for democracy lead to its demise.¹⁷⁶ Furthermore, while the concept of social integration is susceptible to various interpretations, it may serve as a last resort to reinforce national security or the power base of the ruler.¹⁷⁷ This is evident in cases where cultural peculiarity generally dictates social identity, and social identity contributes to the reinforcement of social cohesion from a socio-cultural perspective. For example, modern and contemporary history shows that many political leaders in

172. *Id.* at 219–220.

173. *Id.* at 218.

174. *Id.* at 218.

175. *Id.* at 220.

176. See Susan Chira, *South Korea’s Politics of Prosperity*, N.Y. TIMES (Sept. 6, 1987), <http://www.nytimes.com/1987/09/06/business/south-korea-s-politics-of-prosperity.html?pagewanted=all>.

177. See Randall Peerenboom, *Beyond Universalism and Relativism: The Evolving Debates about “Values in Asia,”* 14 IND. INT’L & COMP. L. REV. 1, 24 (2003).

several Asian countries, such as Japan, South Korea, and Taiwan, have sought to invoke so-called "Asian values" to step up political governance and strengthen social solidarity.¹⁷⁸ Asian values can be generally interpreted as embracing "authoritarianism, cooperation, harmony, and order as the predominant values of Asian cultures."¹⁷⁹ Those leaders have claimed Asian values to advance a policy agenda for authoritarian regime.¹⁸⁰ The political practice of attributing authoritarianism to Asian values takes the form of subordinating the individual to the group, liberty to authority and rights to responsibility.¹⁸¹ Thus, proponents of Asian values proclaim the significance of the social identity in establishing durable political governance and stabilizing governing structure. Employing the collective virtue of the society to that end entails a wide range of restriction of individual human rights, rigorous endorsement of cultural peculiarity, and thereby resistance to cultural intervention in the society. It should be noted that these claims do not advocate an extreme form of authoritarianism or totalitarianism, which forms the ideological backbone of socialist states, including North Korea, China, and Vietnam.¹⁸² With exceptions to those states, for other countries with the history of authoritarian regimes, social identity in the shape of cultural identity served as the underpinning base for Asian values.

In short, a conflation of diverse individual virtues as the collective virtue does not guarantee a just society but rather it is vulnerable to a potential risk in that it may serve as an ideological instrument serving political schemes for legitimizing unjust state violence or strengthening governance. This is obviously a *fait accompli*. Nonetheless, the functional significance of social integration in human rights discourse should be neither overlooked nor negated because the cognizable degree of social collaboration and cohesion is a useful guide for the cultural relativism standard. The application of the social integrity standard prompts two questions: first, what constitutes fundamental values of social integrity; and second, is this standard properly applicable where the enjoyment and exercise of human rights by

178. *Id.* at 54.

179. Michael C. Davis, *Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values*, 11 HARV. HUM. RTS. J. 109, 109 (1998).

180. *Id.* at 110.

181. *Id.* at 111.

182. *Id.* at 115.

an individual or group in a certain society challenge social identity born of common language, history, and culture, which society represents in its entirety?

First, fundamental values of social integrity may differ depending on the ethnic, religious, and cultural societal peculiarities. Clarifying what human rights are involved is also important in searching for fundamental values. These may take various shapes, such as public interest, social order, democracy, social identity, the right to self-determination, the legitimacy of a regime, and so forth. Second, traditional discussions of international human rights have mainly focused on whether the national human rights regime properly secures effective domestic implementation of international norms. Human rights issues, however, are apt to be far diverse and complex in nature. Some may touch upon cultural collision, dissemination, and intervention beyond the border of the country or society in which the culture historically originates. For example, various legal issues raised in the *Charlie Hebdo* incident include a clash between traditional culture of an immigrant Islamic society in France and that of French mainstream society. Thus, this issue in nature falls inside of a de facto cross-border conflict of multi-cultures that have different values from one another and are based on different geo-historical origin. It raises a fundamental question of whether it is just under the international human rights law to offend the collective minds of minority society members by measuring the value of the culture of that society against a set of cultural criteria established in the mainstream society when those societies have heterogeneous cultural origin. When a certain underlying human rights issue is of transnational nature, the rigid and narrow interpretation of the social integrity standard may lead to an argument that this standard is subject to limited application, so long as such an issue contains little or temporary concern that a cultural conflict appearing to occur beyond the border may result in fundamental impediment to social cohesion or assimilation in the relevant society. But, the cross-border issue underlying the *Charlie Hebdo* incident does not seem to fall within this case, as the satirized Islamic culture was not a culture newly disseminated into France but was playing the pivotal role of hardening the collective unity of the minor immigrant society, which had already taken root on French soil, and tying individual members of the society together. The social

integrity standard, however, is of normative significance because it fills a gap in current international human rights law by serving as a non-statutory norm for interpreting and restricting human rights in the context of cultural relativism. As previously stated, this standard merely asks us to look into the relevant society and judge how firmly the cultural identity at issue is integral to that society. Hence, it is important to understand that the social integrity standard is susceptible to extraterritorial application when heterogeneous cultures of different societies are in conflict.

CONCLUSION

In this era of undisputable cultural diversity, the *Charlie Hebdo* controversy reveals the difficulty in creating a society where any negative opinion can be unlimitedly tolerated in the name of freedom of expression. Indeed, such an illusory society would exist, more likely than not, in the utopia. Even if we assume that there might exist one on this mundane sphere, it would be short-lived because society, absent from a minimal restraint mechanism, is fragile against and vulnerable to the internal collapse of the social basis due to the growing polarity between conflicting opinions, which results from a sequence of actions and reactions in a vicious circle, such that an expression of a thought brings out negative feedback and then it is challenged by another counter-thought. Without a reasonable limitation of negative opinions, this chain effect would reveal the frailty of the societal normative regime, which was established to preserve freedom of expression as a fundamental human right of the universal nature. Consequently, it follows that the society would end up with the frustration or disruption of its human rights mechanism.

Here, whether *Charlie Hebdo's* satire of an Islamic taboo falls outside the scope of absolute protection of freedom of expression still remains controversial. Nonetheless, a moderate view of cultural relativism in human rights discourse suggests that human rights are subject to restrictions when the society faces a serious threat to its internal assimilation and cohesion. This suggestion implies that the concept of human rights needs to be construed as admitting neither complete exclusion nor unconditional endorsement of cultural relativism. In other words, human rights should be universally respected but not absolutely protected all

the time. They may be subject to restrictions pursuant to the social integrity standard in the name of cultural relativism. The current international human rights norm—delimited by minimum limitation requirements set forth by a variety of international human rights laws and a certain range of marginal discretion of each state—is susceptible to interpretation that allows a human rights policy to be modified to secure sufficient flexibility, taking into consideration diverse social, cultural, and moral values in the multicultural context.

Revisiting the human rights issue at the heart of the *Charlie Hebdo* incident from a perspective of cultural relativism calls for reevaluation of Islamic society, which was insulted by *Charlie Hebdo*'s public satire of the prophet Mohammad. Unlike Western societies, Islamic society is not a secular society; rather, it grows from roots of united politics and religion. Islam represents more than just a religion for many people in Islamic society and provides the foundation of ethnic, cultural, and religious identities that are collectively integral to Islamic society. Islam also serves as a substantive ground to legitimize national authority and a fundamental value to sustain national and social regimes. Considering the social values and the status of Islam thus leads to the conclusion that freedom of expression may necessarily and properly be restricted to maintain the social integrity of Islamic countries in the application of uniform standards of human rights.

The relative universality of human rights rejects blind normative conformity across the cultural spectrum and respects cultural diversity. While invariable universal values are doubtlessly inherent to human rights, their interpretation and enjoyment should not disregard peculiar cultural identities integral to their respective societies because mores and habits of thought and behavior tend to quickly spread and remain deeply rooted in the society. It should be noted, however, that this view does not refute but rather patently endorses the dicta that any restraint on fundamental human rights, whether statutory or customary, should rarely be allowed, should be *de minimis* level, and should only be invoked under compelling circumstances. The new paradigm of the bounds of freedom of expression clearly complements the dominant global human rights policy. The proposed set of concepts of freedom of expression serves as a normative underpinning of international human rights law by reinforcing longstanding core principles in their entirety, not negating them.

The implementation of such human rights principles in the framework of the proposed paradigm may effectively strike the balance between individual interest of asserting a right to freedom of expression and collective interest of keeping common sociocultural value intact from external encroachment for the preservation of social integrity.