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Manifesting Religion in Public: A Universal Human Right – An International Law – National Restrictions

> Considering that religion or belief, for anyone who professes either, is one of the fundamental elements in his conception of life [...]. (Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief [1981], Preamble)

It is common wisdom that the process of secularization is typical to modern nation states and that it entails a loss of legal privileges for religious organizations. There are developments in modern Europe and elsewhere that confirm this assumption. But on the other hand an international Human Rights System emerged that protects the public manifestations of religions against state interference. This paper scrutinizes the international declarations and conventions that secure a safe place for the manifestations of religions in the national and transnational world order and how they shape the public presence of religious communities.

1 Freedom of Religion – An Inalienable Human Right

The Article on freedom of religion in the Universal Declaration of Human Rights (UDHR, 1948) goes beyond the simple affirmation of the right to freedom of thought, conscience, and religion. Two rights are especially prominent: That everyone can change his or her religion or belief, and that everyone can manifest this religion or belief in community with others.

> Everyone has the right to freedom of thought, conscience, and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance. (UDHR 1948, Article 18)

Religious freedom is often understood as one particular form of the freedom of expression, but what is involved here is a communal right to manifest religion in public. Unlike the "expression" of opinions, "manifesting" refers to an acknowledged form of praxis. The subjective right is derived from an objective religion.

(Van Dijk/Van Hoof 1998, 544–548) Hence specific further rights are linked to the freedom of religion: the right to change one's faith, and the right to a collective public manifestation.[1] The right to change one's faith was introduced by the Lebanese member of the commission that drew up the UDHR, Charles Malik, a Christian politician and philosopher. (Glendon 2002, 69 f.) The right to collective manifestation has its origin in a British supplement to the draft. (Glendon 2002, 285) In addition to private freedom of religion, a right to the public expression of collective religious practices is ensured. The perspective is communalist.[2]

This perspective can also be seen in the fact that the UDHR anchored human rights in collective activities. This generates not only rights, but also duties. Article 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 freedoms and rights, 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 for meeting the just requirements of morality, public order and the general welfare in a democratic society." (UDHR, Article 29)

The word "community" in the first sentence refers to all the possible forms of the formation of the community or society in which the human person attains his or her identity. Duties are generated by the rights that are made accessible by membership in a community, such as one's relatives, an ethnic group, a language, religion, or nation. The unfolding of the personality is made possible, but simultaneously restricted, by the rights and freedoms of other persons. The concept of the "democratic society" (instead of the concept of the "democratic state") was included in the article only after lengthy discussions. It does not refer to state institutions (elections, parliament, executive, judiciary), but to the primary level of the citizens and their organizations.[3] As Hans Joas puts it, democracy in this

1 The analogy to speaking a language is obvious. If there exists a right to speak one's own mother tongue, the linguistic community in which it is spoken must also be protected. Johannes Morsink describes the controversial process that led to the formulation of Article 18 (Morsink 1999). States should provide a legal framework within which the citizens could practice their religion freely. In order to ensure this, the committee adopted a lengthy text by the British delegation that envisaged a coexistence of various religions in one and the same nation. The right to criticize religion thereby moved out of the center of attention. It was ensured by positioning freedom of thought before that of religion. The Islamic states, both then and afterwards, were interested in formulations that did not envisage a falling away from the faith community and that were intended to protect the faith community from unfair missionary activity.

2 Morsink 1999, 258–263.

3 Morsink 1999, 61–65 ("The Term 'Democracy' in Articles 27 and 29"); 241–252 ("The Duties and Communities of Article 29").

context is not an alternative to other principles of political organization: It is the idea of the community itself.[4]

The UDHR formulates communal rights to freedom that were claimed against the totalitarian political forces of Communism and National Socialism. The authors of the UDHR were very conscious of the destruction wrought by these systems. Already the first declarations of human rights, in the United States of America and France at the end of the eighteenth century, indicated a similar direction to be taken. At that period, inalienable human rights were posited in opposition to the powers of the monarchy, the aristocracy, and the church, which were infringing these rights. The citizens inferred from this oppression that they had the right to replace these powers by new governments, and to restrict the rights of these governments by means of constitutions. The outcome was the federal state of the United States of America and the French Republic.

Although there can be no doubt that the article in the UDHR refers to religion, the text speaks in a stereotypical fashion, here and in other passages (like other United Nations documents), of "religion and belief." What is the point of this? In 1993, the Human Rights Committee (HRC) noted in a commentary on Article 18 that the recurring phrases "religion and belief" gives personal convictions a legal right instead of limiting it to its institutional form. Other subjective convictions have the same rights as religious convictions. Theistic, non-theistic, and even atheistic convictions enjoy equal protection. This applies also to so-called new religions and to religious minorities.[5]

4 Hans Joas begins his investigation of the prehistory of the debate about communitarianism with this thesis: "Gemeinschaft und Demokratie in den USA. Die vergessene Vorgeschichte der Kommunitarismus-Diskussion." (Brumlik/Brunkhorst 1993, 49–62)

5 United Nations Human Rights Committee General Comment 1993, 22 (2). "Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms 'belief' and 'religion' are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community." (<http://www.refworld.org/docid/453883fb22.html> [accessed: October 30, 2015])

2 Religion in International Conventions on Human Rights

When the UDHR was formulated, it was part of a further-reaching political project. This solemn declaration was to be followed up by international laws that would give the rights to freedom a legally binding character. This was achieved by means of the International Covenant on Civil and Political Rights (ICCPR), which was adopted in 1966 after many years of consultations, and came into effect in 1973. The Covenant declared that the enshrining of human rights in law fell within the competence of the states. Article 18 of the ICCPR added a clause containing restrictions that derived from the sovereignty of the Nation States:

> (3) Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. (ICCPR, Article 18)

This means that the right to manifest one's religion or belief was completely tied to the national political community. The claim to universal validity of the value of religious freedom encounters its boundaries in the requirements of the nation state to which the petitioner belongs.

After the Covenant came into force, committees of the United Nations supervised the observance of the treaty. Regional associations of states in Europe, Latin America, and Africa were founded and issued their own declarations of human rights, which basically kept to the model of the UDHR in the matter of freedom of thought, conscience, and religion. In Europe, a Court of Human Rights was set up, to which persons affected (whether natural or juridical) could take their cases when they believed that their rights were infringed.

3 Arcot Krishnaswami's Study of Discrimination: Expanding the Religious Field

In 1960, during the process of discussing the ICCPR, the *Study of Discrimination in the Matter of Religious Rights and Practices* was published. Arcot Krishnaswami has written it at the request of a sub-commission of the Commission for Human Rights. (Krishnaswami 1960) This study defended the fundamental significance of the basic right to freedom of religion, and it had a lasting impact on later

United Nations documents on human rights.[6] A high societal value was ascribed to religious freedom. Krishnaswami saw it as a good that can safeguard peace; accordingly, it is in the public interest to defend it. Where religious freedom was trampled underfoot, this led not only to unutterable misery, but also to persecutions of entire groups. For the sake of freedom, it is necessary to put a stop to the discrimination of religions. Judaism, Christianity, Islam, Buddhism, and other religions are forces that extend the boundaries of good neighborliness and brotherliness. In a special way, they represent the spirit of brotherhood to which Article 1 of the UDHR appeals. The right to change from one religion to other religions or convictions, such as atheism, moved into the background. Similarly, Article 18 of the ICCPR avoided speaking of the change of religion or conviction. It speaks only of the freedom "to have or to adopt a religion or belief of his choice." (Lerner 2000, 15)

Krishnaswami interpreted Article 18 of the UDHR in conjunction with Article 29, which affirms that the individual can develop his personality freely and fully only by fulfilling his obligations vis-à-vis the community. This opened up the prospect of including other religious practices. According to Article 18 of the UDHR, it was permissible to manifest publicly the "religion or belief in teaching, practice, worship and observance." Krishnaswami expanded and specified the list of religious rights. Under the "freedom to comply with what is prescribed or authorized by a religion or belief," he listed the following (page numbers in square brackets): (i) worship [31], (ii) processions [32], (iii) pilgrimages [32], (iv) equipment and symbols [33], (v) arrangements for disposal of the dead [34], (vi) observance of holidays and days of rest [35], (vii) dietary practices [36], (viii–x) the celebration of marriage and its dissolution by divorce , [36–38], (xi) the dissemination of the religion or belief [39], and (xii) training of personnel [41]. Then follows a list of actions that can be incompatible with the prescriptions of a religion or belief, and from which the believer has the right to be exempted: (i) taking an oath [42], (ii) military service [43], (iii) participation in religious or civic ceremonies [44], (iv) secrecy of the confession [44], (v) registering by the state of membership in a religion, and participation in vaccination programs.[7]

6 Cf. Lerner 2000, 9.

7 "Compulsory prevention or treatment of disease ..." [45].

3.1 The United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981)

This comprehensive extension of religious rights also left its mark upon the Declaration that the General Assembly of the United Nations adopted in 1981. Its preamble takes over Krishnaswami's assessment.[8]

> Considering that the disregard and infringement of human rights and fundamental freedoms, in particular of the right to freedom of thought, conscience, religion or whatever belief, have brought, directly or indirectly, wars and great suffering to mankind, especially where they serve as a means of foreign interference in the internal affairs of other States and amount to kindling hatred between peoples and nations, [...] Considering that religion or belief, for anyone who professes either, is one of the fundamental elements in his conception of life and that freedom of religion or belief should be fully respected and guaranteed, [...] Convinced that freedom of religion and belief should also contribute to the attainment of the goals of world peace, social justice and friendship among peoples and to the elimination of ideologies or practices of colonialism and racial discrimination [...].[9]

Article 6 of this Declaration likewise agreed with Krishnaswami's 1981 study in specifying the religious rights. In addition to those already mentioned by Krishnaswami, we also find the rights "to establish and maintain appropriate charitable or humanitarian institutions" (Article. 6 [b]) and "to establish and maintain communications with individuals and communities in matters of religion or belief at the national and international levels." (Article 6. [i]) Elizabeth Odio Benito has called all these rights "corollary freedoms." Some of them indisputably fall under the heading of "teaching, practice, worship and observance," as indicated in the UDHR. Others specify further institutions and activities: places of assembly, objects used in worship, publications, financial donations, education, and holidays.[10] All these are protected manifestations of religion or belief. The canopy

8 The history and the obligatory character of the Declaration are presented by Sullivan 1988.

9 <http://www.un.org/documents/ga/res/36/a36r055.htm> [accessed: 4 November 2014].

10 Article 6:

"In accordance with article 1 of the present Declaration, and subject to the provisions of article 1, paragraph 3, the right to freedom of thought, conscience, religion or belief shall include, inter alia, the following freedoms:

To worship or assemble in connexion with a religion or belief, and to establish and maintain places for these purposes;

To establish and maintain appropriate charitable or humanitarian institutions;

To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;

To write, issue and disseminate relevant publications in these areas;

that protects the human right to religious fellowship is thereby extended to cover linked forms of society and communication. This also affects the discourse about religion as a fundamental element in the human "conception of life." This means that more must be involved than the basic right of an individual:

> Considering that religion or belief, for anyone who professes either, is one of the fundamental elements in his conception of life and that freedom of religion or belief should be fully respected and guaranteed [...].[11]

4 Foreign Policy at the Service of Religious Freedom

From the 1970s onwards, there was a rapid increase in the number of Non-Governmental Organizations,[12] associations of citizens who worked on a national and a worldwide basis to promote the observance of human rights, and who could get accreditation to the United Nations. Some of these groups acted out of religious convictions, others for ethical and political reasons, when they demanded that human rights be granted both in principle and in practice. (Frantz/Martens 2006; Flanigan 2010; Cmiel 2004; Forsythe 2013, Ch. 7: "Non-governmental Organizations and Human Rights") Kathryn Sikkink uses the metaphor of a boomerang effect to describe the political dynamic that this has repeatedly generated. If a state disregards the claims of such an organization and refuses to take corrective action in its territory, the organization can contact sister organizations in other countries and ask them to put pressure on their own governments to help ensure that human rights are observed in the state that is withholding them. (Sikkinik 2011, Keck/Sikkink 1988, Ch. 3: "Human Rights Advocacy Networks in Latin America")

The Helsinki Accords of 1975 and the agreements at the subsequent meeting in Vienna had the boomerang effect that Kathryn Sikkink describes. In 1978,

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To teach a religion or belief in places suitable for these purposes;
To solicit and receive voluntary financial and other contributions from individuals and institutions;
To train, appoint, elect or designate by succession appropriate leaders called for by the requirements of one's religion or belief;
To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;
To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels."

11 <http://www.un.org/documents/ga/res/36/a36r055.htm> [accessed: 4 November 2014].

12 "Compulsory prevention or treatment of disease ..." [45].

Aryeh Neier set up the small Helsinki Watch group, an NGO that gave birth to the Human Rights Watch. In the turmoil of 1989, religious communities and associations were among the groups in Eastern Europe that demanded the new freedoms for themselves and fought for a democratization of their states. (Sikkinik 2011, 106 f.; Neier 2012, 204–232)

The United States of America made the observance of religious rights an instrument of their foreign policy. This was a success on the part of the Christian Right, which had grown in strength. While liberal churches had largely ceased to conduct international missionary campaigns, Evangelical and fundamental groups had become all the more active in this field. With the aid of influential senators, they persuaded Congress to pass the International Religious Freedom Act (IRFA) in 1998:[13]

> An Act to express United States foreign policy with respect to, and to strengthen United States advocacy on behalf of, individuals persecuted in foreign countries on account of religion; to authorize United States actions in response to violations of religious freedom in foreign countries; to establish an Ambassador at Large for International Religious Freedom within the Department of State, a Commission on International Religious Freedom, and a Special Advisor on International Religious Freedom within the National Security Council; and for other purposes. (International Religious Freedom Act (IRFA) 1998)

This law required the Executive to promote religious freedom everywhere in the world and to act on behalf of persons who were persecuted because of their faith; it authorized the United States government to take measures against countries in which religious freedom was violated. A Standing Commission was given the task of making known violations of religious freedom and making policy proposals. It is affirmed that the United States is particularly called to implement this policy, since the origin and the existence of the country are based on freedom of religion. Throughout its entire history, from the time of its foundation by persons who were persecuted for religious reasons down to the present day, the United States is said to have upheld this principle. There is only a little step from this affirmation to the claim that the United States thereby fulfills a salvation-historical mission; this step is taken in Evangelical fundamentalist thinking. (Kippenberg 2007) In this way, spaces for action opened up everywhere in the world, and Evangelical missionaries made diligent use of them. (Hertzke 2004) In addition to large religious organizations, local churches profited from this law: They founded congregations

13 Amstutz locates this episode in a long history of Evangelical involvement in foreign policy. (Amstutz 2004, 147–151)

abroad and collaborated with their "sister churches."[14] When they encountered opposition in many countries, they justified themselves by appealing to the conventions on human rights; and they could count on the support of the American government. As Michael Ignatieff has pointed out, there is a dangerous element in these convictions. A promise of protection was able to turn into a political ideology that justified military force – and that is a perversion, since human rights, as a political praxis, are not above criticism. They are not regulations that politicians tell other countries to follow. Rather, they empower people to independent thinking and to criticism.[15]

5 The European Human Rights Regime

The history of the European Convention on Human Rights is a classic example of a regional human rights regime that results when it becomes possible to take one's own state before a transnational court and demand the implementation of human rights. (Donnelly 2003, 138–143; Forsythe 2013, 155–180) The individual possesses basic rights independently of his citizenship in one of the member states; the appeal to human rights imposes a restriction on the principle of the sovereignty of nation states. (Hoffmann 2010, 23)

The Council of Europe enacted a Convention on Human Rights in 1950. After numerous states (including Turkey) acceded to this Convention, it came into force in 1953. By 2014, all the European states, including those in Eastern Europe with the exception of Belarus, had become members of the Convention. By acceding to it, they have committed themselves to guarantee participation in human rights to every person who is subject to their authority. To ensure this, a transnational court was established in Strasbourg.

Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) followed Article 18 of the UDHR:

> 9 (1). Everyone has the right to freedom of thought, conscience and religion; this includes the freedom to change his religion or belief and freedom, either alone or in community with

14 For a presentation of the missionary methods, cf. Brower/Gifford/Rose 1996, Ch. 9: "Spreading the Word: Organizational Techniques, Theological Emphases, and Pastoral Power;" on the "sister church" model, cf. Bakker 2014.

15 Instead of making the list of those basic rights that are acknowledged in the West the standard for judging other states, Michael Ignatieff proposes focusing on elementary violations of basic rights: Ignatieff et al. 2001a (cf. also review by Carter 2002); Ignatieff 2001b.

> others and in public or in private, to manifest his religion or belief, in worship, teaching, practice and observance.[16] (ECHR, 10 f.)

This is followed by a section about limitations on the manifestation of these freedoms. Article 29 (2) of the UDHR had already envisaged a restriction on the exercise of rights and freedom.[17] The ICCPR heightened this restriction on the public manifestation of religion, which is also found in the European Convention of Human Rights:

> 9 (2): Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others. (ECHR, 11)

When they acceded to the Convention, the states agreed to a review of their legislation, although the European Court was not a constitutional court, nor did it have the right to abrogate national laws. (Tulkens 2009, 2576 f.) The review looked at the following questions: Did the laws prescribe the restrictions? Were they unavoidable in a democratic society, in order to ensure public safety, order, health, and morals, and to protect the rights and freedoms of other persons? If someone regarded the limitations imposed on his manifestation of religion or belief as contrary to the law, and the courts of his country rejected his complaint, he could bring charges against the state before the European Court of Human Rights (ECtHR) in Strasbourg.

The application of the criteria of Article 9 (2) proved to be anything but simple. The complaints against restrictions on the freedom of manifestation came from nationals living in member states with constitutions that had regulated the relationships between the state and religion in diverse ways, and that did not consider a change of their laws. There were states such as France or Turkey, in which religions had a place in the public sphere only to the extent that this was given to

16 The order in the UDHR is: teaching, practice, worship, and ritual observance; in the ICCPR, the order is: worship, ritual observance, practice, and teaching.

17 Article 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."

them by the state (secularism; laicism); other states, such as Greece, the United Kingdom, or Scandinavian countries recognized the majority religion as a state church; and others again practiced models of cooperation between the churches or religious communities and the state (e.g., Germany, Austria).

The problem was made more acute by the expanding religious diversity in the European countries, as a consequence of worker's migration (including Muslims), of new religious movements, and finally, of the accession to the Convention of Eastern European countries with their national churches. (Anthony 2005, 49 f.; Michalski 2006) In all these countries and cases, the inhabitants were now to have an equal right to manifestation, and they were able to make a legal complaint if this right was restricted. The 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief had greatly extended the religious field. The courts would have to decide whether, and to what extent, a legal restriction was legitimate or discriminatory. The arguments for and against the restriction had to be presented to the ECtHR, which would then take its decision. (Habermas 1998, 563 f.) The legal procedure decided about the legitimacy of manifesting one's religion or belief. In this way, a third level of the validity of human rights came into existence: In addition to the Declaration of universal rights and its juridification in international conventions and treaties, a legal discourse emerged among the European states involving an exchange of arguments about the public manifestation of religion and of its practices.[18]

5.1 The Clarification of Controversial Concepts

The Court reacted to this problem by going beyond a mere verdict in several exemplary cases, and providing a detailed justification of the system on which the decision was based. We are told by a verdict in 1978 that the intention of the Court was to explain, to safeguard, and to develop the rules that were a consequence of the Convention: this was necessary in order to create universal standards for the protection of human rights in the member states. (Gerards 2009, 424–427) Seen in this light, its verdicts certainly contained something of a "constitutional component." (Garlicki 2009) In cases concerning Article 9, 213 verdicts were delivered between 1962 and 21 March 2012, including appeals.[19]

18 For a detailed presentation and analysis of academic conflicts about freedom of religion in Germany, cf. Reuter 2014.

19 An overview is provided by the Department of Legal Studies at the University of Trier: <http:/www.uni-trier.de/fileadmin/fb5/inst/IEVR/Arbeitsmaterialien/Staatskirchenrecht/Europa/EGMR/ECHR.pdf> [accessed: 31 October 2015]. This overview does not claim to be exhaustive.

In 2009, two manuals commissioned by the Council of Europe were published, with the aim of clarifying fundamental concepts and rules that are particularly disputed: the *Manual on the Wearing of Religious Symbols in Europe*, written by Malcolm D. Evans (Evans 2009), and the *Manual on Hate Speech*, written by Anne Weber. (Weber 2009) The first handbook contains verdicts of the ECtHR on controversies about restrictions on public manifestation; the second contains verdicts on the protection of religion against insults. In an accompanying press release, the Council of Europe explained its intention:[20]

> The manuals aim to clarify both concepts, which have caused intense controversy in Europe in the last years, and to guide policy makers, experts and others mainly through the case law of the European Court of Human Rights.

5.2 The Margin of Appreciation of Nation States

One fundamental concept that helped to find a solution was that of a margin of appreciation of the member states in the restrictions they imposed on public manifestation. In 1976, the Court had to decide whether British authorities could confiscate a school textbook on the grounds that it was obscene and liable to corrupt young people – the book contained a chapter about sexuality, in which it discussed masturbation, orgasm, sexual intercourse, petting, and contraception. The publisher regarded this as an infringement of his right to express his opinions freely (Article 10 of the ECHR). After British courts had rejected this complaint, the ECtHR took the side of the British authorities. After examining the reasons for the British verdict, the Court concluded:

> It is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterized by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them.[21]

20 Press Release 799 (2008), text on the homepage of the Council of Europe, Directorate of Communication [accessed: 24 November 2014]. Two appendixes to this document contain extensive so-called Factsheets on the two offenses. Cf. Lerner 2000, 42–44.

21 <http://hudoc.echr.coe.int/eng?i=001-57499> [accessed: 31 October 31, 2015].

The Court did not declare itself to be incompetent in general terms. It simply acknowledged that moral views hold sway in the member states that make it necessary to prohibit the dissemination of the book, even if other member states take a different view on this point. (Evans 2009, 20 f.)

In the case of religion too, the Court acknowledged a similar margin of appreciation. Is it acceptable to refuse the Otto Preminger Institute in Austria a license to show the film *Das Liebeskonzil* by the Austrian director Werner Schroeter?[22] The Austrian authorities justified their prohibition by saying that the film offended the feelings of Catholics, and the European Court ruled in 1994 that this justification was sufficient:

> As in the case of 'morals' it is not possible to discern throughout Europe a uniform conception of the significance of religion in society [...]. For that reason it is not possible to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is directed against the religious feelings of others. A certain margin of appreciation is therefore to be left to the national authorities in assessing the existence and extent of the necessity of such interference.[23]

The doctrine of the "margin of appreciation" makes it possible to take into account the diversity of moral and religious sensibilities in reviewing a national restriction on manifestation.[24] The European Court cannot identify a European consensus on matters of morality or religion, but although it acknowledges national reasons for restrictions, it also tests their plausibility.

The principle of the "margin of appreciation" and its application has given rise to controversies. It has been claimed that the Court is opening the door wide to cultural relativism. While some assert that minorities draw the short straw and universal standards are made impossible (Benvenisti 1999), others say that when the Court reviews the local standards of evaluation, assesses them, and describes them using its own conceptuality, it helps to bridge the gap between the general and language of the Convention and the specific language of the claims that are made.[25] As will become clear, both sides can point to verdicts that support their view.

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22 <http://hudoc.echr.coe.int/eng?i=001-57897#> (50) [accessed: 31 October, 2015].

23 Otto-Preminger-Institut versus Austria – Chamber Judgment 20 Sep. 1994 § 50. <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57897> [accessed: 31 October, 2015].

24 For basic articles explaining the notion cf. Brems 1996 and Nigro 2010.

25 Brems 1996, 312–314. For a debate with both positions, cf. Mahoney 1998 ("The Doctrine of the Margin of Appreciation under the European Convention on Human Rights: Its Legitimacy in Theory and Application in Practice").

5.3 Restrictions on Public Manifestations

Cases like that of *Buscarini and Balda v. San Marino* were relatively simple. The two men were elected to the parliament of San Marino, but before they could take their seats, an electoral law of 1909 required them to take an oath on "the holy Gospels." The Court saw this as a violation of the freedom of conscience guaranteed in Article 9; but it also regarded the one-sided reference of the oath formula to Christianity as inappropriate.[26]

More arguments were necessary in order to assess the admissibility of a complaint by a British pacifist against her government in 1978 (*Arrowsmith v. UK*, Report of the European Commission on Human Rights, 12.10.1978). Pat Arrowsmith had distributed leaflets in front of the barracks of soldiers who were leaving for Northern Ireland, urging them to refuse to take part in military service. Since such an exhortation is prohibited, she was sentenced to imprisonment. She complained to the Strasbourg Court that her right to freedom and safety in accordance with Article 5 had been infringed, but the Commission did not agree with her (§ 63–66). Nor had her right to the "manifestation" of her belief (Article 9) been violated. The Commission does indeed acknowledge pacifism as a settled belief in accordance with Article 9 (1), and it sees the plaintiff as a convinced pacifist who rejects violence in principle (§ 68–69). But the Commission rejects the idea that the distribution of leaflets appealing to soldiers to desert is the manifestation of a religious praxis (§ 69). It continues:

> The Commission considers that the term 'practice' as employed in Art. 9 (1) does not cover each act which is motivated or influenced by a religion or a belief. [...] However, when the actions of individuals do not actually express the belief concerned they cannot be considered to be as such protected by Art. 9 (1), even when they are motivated or influenced by it (§ 71).[27]

The specific act of distributing an appeal to soldiers to act in contradiction of the law is not motivated by religion or belief (§ 72–75). And an action that is religiously motivated is not *per se* a protected "public manifestation." (Evans C. 2001, 105 f.; Evans M. 1997, 216)

One of the judges contradicted this view in a dissenting opinion. Mr. Opsahl stated that whereas he agreed with the distinction between a religious motivation and the public manifestation of religious action, otherwise any act motivated by beliefs criminal ones could be protected.

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26 <http://hudoc.echr.coe.int/sites/eng/(pages/search.aspx?i=001-58915> [accessed: 14 November 2014].

27 <http://www.strasbourgconsortium.org/common/document.view.php?docId=5399> [accessed: 25 November 2014].

> On the other hand, one cannot in my opinion generally exclude from Art. 9 all acts which are declared unlawful according to the law of the land if they do not necessarily manifest a belief, provided they are clearly motivated by it.-I consider that Art. 9 must, in principle, be applicable to a great many acts which are not, on their face, necessarily manifesting the underlying or motivating belief, if that is what they *genuinely* do. This is important where such acts cannot readily be seen as protected by other provisions of the Convention. Such is the case as regards, e.g. religious or conscientious objection to civil or professional duties.[28]

5.4 The Right of a Religious Body as Such

Another lawsuit made it necessary to clarify the rights of religious organizations. Are their rights only derived from the subjective human rights of their members, or does the organization possess a right of its own? In 1977, after complaints, the Swedish consumer ombudsman forbade Scientology to advertise the Hubbard electrometer, which it had praised as a valuable aid in the measurement and transformation of states of mind. Scientology regarded this as an unjustified restriction on their religious praxis, and complained to the Court in Strasbourg. But before the Court discussed the complaint (which it then rejected), it had to admit the complaint in the first place. The Commission declared that it would take this opportunity to revise its previous view that only natural persons had the right of action, and that the distinction in Article 9 (1) between a church and its members was artificial, since it was the church that presented the application on behalf of its members. Accordingly, it must be acknowledged that the church, as a corporate body, likewise possesses these rights and can exercise them (*X. and Church of Scientology v. Sweden*).[29]

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28 <http://www.strasbourgconsortium.org/common/document.view.php?docId=5399> (p. 41) [accessed: 25 November 2014].

29 *X. and Church of Scientology v. Sweden* (Application No. 7805/77, 5 May 1979) § 2. "The Commission, however, would take this opportunity to revise its view as expressed in Application No. 3798/68. It is now of the opinion that the above distinction between the Church and its members under Article 9 (1) is essentially artificial [...] When a church body lodges an application under the Convention, it does so, in reality, on behalf of its members. It should therefore be accepted that a church body is capable of possessing and exercising the rights contained in Article 9 (1) in its own capacity as a representative of its members. This interpretation is in part supported from the first paragraph of Article 10 which, through its reference to 'enterprises,' foresees that a non-governmental organisation like the applicant Church is capable of having and exercising the right to freedom of expression. Accordingly, the Church of Scientology, as a non-governmental organization, can properly be considered to be an applicant within the meaning of Article 25 (1) of the Convention." <http://www.strasbourgconsortium.org/document.php?DocumentID=4489> [accessed: 14 November 2014].

In the case *Hasan and Chaush v. Bulgaria* (2000), the Bulgarian government took a decision about the appointment of the national Mufti after a lengthy dispute in the country's Islamic community. Fikri Sali Hasan, who had lost out, and another member of the community complained against this intervention. The Court agreed with them that Article 9 had been violated:

> The Court recalls that religious communities traditionally and universally exist in the form of organized structures. They abide by rules which are often seen by followers as being of a divine origin. Religious ceremonies have their meaning and sacred value for the believers if they have been conducted by ministers empowered for that purpose in compliance with these rules. The personality of the religious ministers is undoubtedly of importance to every member of the community. Participation in the life of the community is thus a manifestation of one's religion, protected by Article 9 of the Convention. Where the organisation of the religious community is at issue, Article 9 of the Convention must be interpreted in the light of Article 11, which safeguards associative life against unjustified State interference. Seen in this perspective, the believers' right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organization of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable (§ 62).[30]

The verdict in the case of *Metropolitan Church of Bessarabia and Others v. Moldova* (2001) affirms once again that an autonomous right to existence on the part of religious bodies, independently of the state, is necessary for a democratic society.[31]

5.5 Religious Pluralism as a Legal Norm

The justification (§ 114–119) refers to a judgment that established criteria: *Kokkinakis v. Greece* (1993). It is not only quoted in the present case, but is also taken as a precedent by judges and lawyers in other verdicts. Minos Kokkinakis, a Jehovah's Witness, was tried and convicted by the Greek state for violating the prohibition of engaging in unfair missionary work: He had attempted to explain to his neighbor the beliefs of the Jehovah's Witnesses. Kokkinakis appealed against this in Stras-

30 Case of *Hasan and Chaush v. Bulgaria* (Application No. 30985/96 26 October 2000): <http://strasbourg.consortium.org/document.php?DocumentID=5313> [accessed: 14 November 2014].

31 *Metropolitan Church of Bessarabia and Others v. Moldova* (Application No. 45701/99): <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59985>), § 114–119 [accessed: 14 November 2014].

bourg. The majority of the judges found nothing objectionable in the Greek law;[32] but they held that the Greek judiciary ought to have drawn a distinction between a legally permitted manifestation of faith and a dishonest proselytizing. Public manifestations of faith ought never to be prohibited. The justification of the freedom of thought, conscience, and religion in article 9 is crucial and has often been quoted:

> As enshrined in article 9, freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, skeptics and the unconcerned. The pluralism indissociable from a democratic society, which has been clearly won over the centuries, depends on it.[33]

This justification sheds light on a number of other verdicts, some of which are contradictory and disputed. In Italy, Soile Lautsi had demanded that her two children should be taught in a classroom without a Christian crucifix on the wall. When this demand was rejected by the Italian courts, she brought the dispute before the Court in Strasbourg in 2006.[34] She claimed that the cross in a state school violated both the principle of the secular nature of the state and her right to educate her children in accordance with her convictions, which was guaranteed by Article 2 of Protocol 1 of the ECHR.[35] The government held that the presence of the cross in Italy's state schools was authorized by decrees of 1924 and 1928, and that its primary significance was not religious: It represented one of the values from which Italian democracy lived. In the first trial, in 2006, the ECHR took the side of the mother and declared that the state had violated its obligation to observe confessional neutrality. It was ordered to pay the mother compensation. In the appeal trial, in 2011, the Grand Chamber reached the opposite verdict.[36] It began by examining the praxis in other member states. The cross was forbidden in state schools in only a few of these: in Macedonia, France, and Georgia. In some member states, as in Italy, its presence was specifically prescribed (Austria, Poland, some German federal states, Swiss municipalities). In

32 Only one of the Strasbourg judges declared in his separate opinion that such a criminalization was a contravention of the European Convention.

33 *Kokkinakis v. Greece*, Judgment 25 May 1993, § 31. <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57827> [accessed: 14 November 2014].

34 <http://www.strasbourgconsortium.org/common/document.view.php?docId=4687> [accessed: 14 November 2014].

35 "The State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions" (§ 27).

36 <http://www.strasbourgconsortium.org/common/document.view.php?docId=5303> [accessed: 14 November 2014].

other member states, it was present in schools without any specific regulations (Spain, Greece, Malta, San Marino, Rumania) (§ 27). Some of the member states who were involved in the trial declared that half of all Europeans lived in non-secular states; a state that supported only the secular, as opposed to the religious, would not in the least be neutral (§ 47). All this led to a new evaluation:

> There is no evidence before the Court that the display of a religious symbol on classroom walls may have an influence on pupils and so it cannot reasonably be asserted that it does or does not have an effect on young persons whose convictions are still in the process of being formed.[37] (§ 66)

The Court evaluated the public manifestation of the Christian faith, not from the perspective of individual religious freedom, but from that of the right of a (political) community to the public manifestation of its religion.

We find a different logic in verdicts about claims by Muslims to manifest their religion in public. One case, *Dahlab v. Switzerland*, concerned the banning of the headscarf in a Swiss state school.[38] The plaintiff, Lucia Dahlab, had been appointed by the State Council of the canton of Geneva to a teaching post at a primary school in 1990. In 1991, she converted to Islam and wore the headscarf for three years without being challenged, until the Geneva school authority forbade this in 1996. On 15 February 2001, the European Court held this restriction of the manifestation of religion to be acceptable, since its aim was to protect the rights and freedoms of primary school children between the ages of four and eight, who are particularly easy to influence. The written justification of the verdict went beyond the concrete case and discloses a religious practice contradicting a principle of a democratic society.

> The applicant's pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytizing effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.[39]

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37 <http://www.strasbourgconsortium.org/common/document.view.php?docId=5303> (p. 28), [accessed: 14 November 2014].

38 *Dahlab v. Switzerland* (Application No. 42393/98, 15.2.2001), <http://www.strasbourgconsortium.org/document.php?DocumentID=1136> [accessed: 14 November 2014].

39 <http://www.strasbourgconsortium.org/document.php?DocumentID=1136> (p. 9), [accessed: 14 November 2014].

This verdict made enormous waves. A bearer of basic rights who had appealed for her rights to be observed became the object of moral accusations as one who defended the inequality of the sexes, and hence a praxis that was incompatible with a secular democratic society. "The right-holder ceases to be Ms. Dahlab and she becomes someone 'accused'." (C. Evans 2006, 7) The Court ought also to have looked at the personal reasons for wearing the headscarf. If it had done so, it would have realized that Muslim women throughout the world had gone over to wearing the headscarf from the 1970s onwards, as a result of their own decision. Empirical studies show the variety of motives that led them to do this – motives that had been accepted by other courts. (Cf. Ahmed 2011; Hafez 2011; Bowring 2010) This kind of ambiguity is in fact typical of Islam, as Thomas Bauer (2011) has shown. If, however, the headscarf is a decision by the woman herself, not something forced on her by others, the Court would have had the task of seeking a balance between the woman's right to personal self-determination and a restriction of her religious praxis in the primary school. (Marshall 2008, 636) But the Court applies the criterion of exemplarity for a democratic society, when it evaluates the restriction of the individual right to public manifestation.

The Court acted in a similar manner in the case of Leyla Ṣahin's complaint against Turkey.[40] She had studied medicine in Bursa, and then enrolled at the Faculty of Medicine in the University of Istanbul in 1997. When she arrived for a written examination in March, 1998, she was refused admittance because she wore a headscarf. The University administration had sent out a circular letter one month earlier, stating that students with headscarves (and beards) would not be admitted to academic events, and that their names would be removed from the list of students (§ 11–13). The plaintiff requested that this circular letter be rescinded in her case. She justified this by appealing to Article 9 of the European Convention (§ 64). She also declared that the choice of the headscarf was not directed against the republic and its values, nor was it intended to win other persons over to Islam (§ 85–87). When her complaint was rejected by the Turkish courts that were competent to hear it, she applied to the Court in Strasbourg. In this case too, the Court looked at how this problem was dealt with in other member countries of the Council of Europe. Since there was a great variety in Europe, Turkey was allowed a national margin of appreciation with regard to the necessity of the measure that was taken (§ 102). And here too, the Court added a kind of demonstration of this necessity:

> In such a context, where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women are being taught and applied in practice,

40 *Leyla Ṣahin v. Turkey* (Application No. 44774/98, 10.11.2005), <http://strasbourgconsortium.org/document.php?DocumentID=3814> [accessed: 14 November 2014].

> it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn (§ 116).[41]

Instead of examining whether the judgment against wearing the headscarf is genuinely necessary according to the criteria of the European Convention, the Court simply regarded secularism and the equality of the sexes as the higher good. This did not go uncriticized. The Court had committed itself to a concept of secularity as a public arena without religion. As José Casanova, Charles Taylor, and Paul Weller have shown, however, secularity can also refer to a public arena in which a variety of religious views and communities compete with one another on an equal footing.[42] The Human Rights Commission of the United Nations criticized the position taken by the ECHR as well. (Lindholm 2012; Martinez-Torrón 2012; Moe 2012) With regard to cases involving Muslim issues, the application of the margin of appreciation obviously disadvantaged Muslims.

5.6 The Protection of Religions against Public Defamation

Rights to protection were linked to the right to the public manifestation of religions and beliefs. The freedom of expression is not absolute. It is subordinate to formalities, conditions, restrictions, or the threat of penalties. These are envisaged by the law and are necessary in a democratic society. These include also the good reputation and the rights of other persons (European Convention, Article 10 [2]). The Court frequently has to decide in lawsuits concerning incitement to hatred. The ICCPR says: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law" (Article 20 [2]). Although the European Convention does not contain this precise prescription, the compilation of Anne Weber's *Manual on Hate Speech* shows that numerous legal instruments exist. (Weber 2009, 7–17) According to the Council of Europe, the term "hate speech" covers every kind of statement that spreads, incites, promotes, or justifies racial hatred, xenophobia, Anti-Semitism, or other forms of hatred. Such statements are based on intolerance, aggressive nationalism

41 *Leyla Şahin v. Turkey* (Application No. 44774/98, 10.11.2005), <http://strasbourgconsortium.org/document.php?DocumentID=3814> (p. 29), [accessed: 14 November 2014].

42 Paul Weller (2007) has discussed the relationship that comes to light here between human rights, religion, and secularity, in "'Human Right,' 'Religion' and the 'Secular': Variant Constructions of Religion(s), State(s) and Society(ies)." The secular context can assume various forms in law.

and ethnocentricity, discrimination, and hostility against minorities, migrants, and post-migrants. (Weber 2009, 3) But it does not cover generally critical statements about religion, even when these are shocking or objectionable. (Weber 2009, 52)

Blasphemy was long a punishable offense in the national laws of a number of European states. (Kippenberg 2010) In England, prosecutions were rare, but they did occur even in the twentieth century. In 1976, the publisher of the fortnightly newspaper *Gay News* was prosecuted under these laws (Levy 1993), after he published the poem "The Love that Dares to Speak its Name" by James Kirkup. The love that is given a voice here is that of the Roman centurion on Golgotha, who took the body of the dead Jesus down from the cross and had homosexual intercourse with it; this was described in obscene detail. Mary Whitehouse, an activist against cultural permissiveness, then took the newspaper and its editor, Denis Lemon, to court for spreading blasphemous texts. Lemon was sentenced to eighteen months imprisonment on probation and to a fine of £1,000. After a public campaign against this verdict, the prison sentence was dropped. In the end, the trial costs and the fines amounted to nearly £10,000.

Muslims in England wanted to build on this case to take Salman Rushdie and the publisher of his novel *The Satanic Verses* to court for blasphemous utterances. On 13 March 1989, Abdal Choudhury, a British Muslim, applied to a London court to open a criminal trial.[43] The refusal was lapidary: "The application was dismissed on the basis that the offence of blasphemy relates only to Christianity." The plaintiff appealed to Strasbourg, but here too his application was refused. There were very few convictions for blasphemy in Great Britain in the twentieth century – apart from the lawsuit against *Gay News*, there was only one other conviction, in 1922 – and a government commission had recommended in 1985 that blasphemy should no longer be a punishable offense. The Court could not see any compelling link between the exercise of religious rights and a demand of Muslims that the state should protect them against the publication of defamatory utterances. It dismissed the lawsuit on 5 March 1991.

But in another case the Court recognized the English blasphemy law. The object of *Wingrove v. UK* was a nineteen-minute film made in 1989 that had been refused a certificate by the British Board of Film Classification. This film depicted Saint Teresa of Avila becoming sexually excited as she embraced the body of the Lord. The European Court held the Board's decision to refuse a certificate to be

43 Excerpts from texts are taken from the records of the trial before the European Court for Human Rights, which recapitulated the course of the previous trial before then refusing to open a trial. (<http://www.strasbourgconsortium.org/common/document,view.php?docId=4698> [accessed: 14 November 2014])

legitimate. In the justification of its verdict on 26 October 1995, the Court also said something about the legitimacy of the blasphemy law:

> The Commission considered that the English law of blasphemy is intended to suppress behavior directed against objects of religious veneration that is likely to cause justified indignation amongst believing Christians. It follows that the application of this law in the present case was intended to protect the right of citizens not to be insulted in their religious feelings (§ 47).[44]

The Court issued a similar verdict in the case of *Otto-Preminger-Institut v. Austria*. Here too, it acknowledged that Catholics had a right to be protected from films with hurtful blasphemous contents.

Since more and more non-Christian faith communities, which were not protected by the blasphemy law, had come into existence in Great Britain, various official commissions from 1985 onwards took up the question of its future position in English law. The legal situation was regarded as generally unsatisfactory. There was no clear guideline about the penalties to be inflicted; only the publication was punished, not the offensive statement itself; and only the English church enjoyed protection. (House of Lords 2003, 10) Accordingly, the government decided to change the law. The old Act was replaced by a Racial and Religious Hatred Act that prohibited "incitement to religious hatred." General dogmatic statements (for example, the damnation of unbelievers in the Bible or the Quran) could not be chargeable, but only public speech that stoked hatred of those who held different beliefs. After the new law came into force, the Criminal Justice and Immigration Act of 2008 proceeded to the "abolition of common law offences of blasphemy and blasphemous libel." The law of blasphemy lost its context in state church law, but it did not disappear without a replacement. Jean-Pierre Wils has construed the history of blasphemy as the reshaping of a metaphysical crime, feared and persecuted by rulers and by society, first, into a protection of Christian churches from insults, and finally, into a protection of personal religious identities. (Wils 2007, 18)

The prohibition of blasphemy comes from an epoch in which the state power employed the law to protect ecclesiastical Christianity from defamation, but times have changed. Even England, with its state church, could not avoid seeing how adherents of non-Christian religions – Hindus, Sikhs, Muslims, and Buddhists – demanded the right to manifest their religion in the public arena without hindrance. Sociologists had assumed for a time that religions would lose their protection by the state in modern society; they would be dislodged from the public arena and would continue to exist primarily in the private sphere. But

44 <http://www.strasbourgconsortium.org/common/document.view.php?docId=370> [accessed: 14 November 2014].

this hard thesis of secularization has been disproved by the *de facto* history of religions in the modern age – with the result that religions can certainly still be observed in the public arena, in social forms that have been given labels such as "public religion" and "deprivatization of religion" (José Casanova) or "vicarious religion" (Grace Davie). In general, the communities referred to by these terms no longer derive their legal claims from state church law; rather, the relationship of the state to the faith communities is mediated via the basic rights of the citizens and by international law. (Walter 2006, 358 f.) Hence in the case of Germany, the legal scholars Hans Michael Heinig and Christian Walter have brought a new legal concept into play: "'Religious constitutional law' pleads for a definition of the relationship between the states and the faith communities in civil society that takes basic rights as its guideline." (Heinig/Walter 2007, 3) The conflicts about the old offense of blasphemy in state church law, which called for a judgment in the sphere of international human rights law, became the starting point for a new legal offense that define anew the rules that govern Europe's religious diversity. It is incumbent on the organs of the state to ensure that this respect becomes a reality in the public sphere. (Evans 2009, 26–30)

6 Universal Value – International Law – National Rights

The human right to freedom of religions and beliefs has been shaped through different categories. The UDHR Article 18 adopted a transmitted notion of freedom of religion from the end of the eighteenth century. It envisioned a community of citizens free from monarchy, aristocracy, and clerics. Two centuries later the UDHR directed the right against tyrannical powers of one's own age (Bolshevism, National Socialism). Religious freedom is given a place within democracy, where the state is defined as a community under the rule of law. The right covers a public manifestation of religion in terms of teaching, practice, worship, and observance.

When UN Covenants turned Human Rights Declarations into legal norms recognized by the Member States of the UN, a new legal dimension emerged: people claiming their basic rights violated. The initial Declarations of Human Rights in France and the emerging Unites States had their roots in European philosophy and church history. The claims people are advancing today are to a much greater extent independent of the specifics of the socio-cultural context. Here the observations by Dame Rosalyn Higgins, former President of the International Court of Justice in Den Haag, are revealing.

> Individuals everywhere want the same essential things: to have sufficient food and shelter; to be able to speak freely; to practice their own religion or to abstain from religious belief; to feel that their person is not threatened by the state; to know that they will not be tortured, or detained without charge, and that, if charged, they will have a fair trial. I believe there is nothing in these aspirations that is dependent upon culture or religion or stage of development. They are as keenly felt by the African tribesman as by the European city-dweller, by the inhabitant of a Latin American shanty-town as by the resident of a Manhattan apartment. (cit. in Harris 2010, 657)

One of the best experts in this field, Jack Donnelly, does not hesitate to ascribe a universal validity to the concept though it arose in the West. (Donnelly 2002, Ch. 2, criticism by Goodhart 2008, response by Donnelly 2008) He argues that other cultures or religions likewise know the obligation to recognize human dignity. Nevertheless, an appeal to this obligation does not always and everywhere guarantee the same substantial rights, and this means that human rights are both universal – as an empowerment to make demands, and particular – as their substance differs from one epoch and culture to another.

> Human rights empower those individuals and groups who will bear the consequences to decide, within certain limits, how they will lead their lives. Therefore differences in implementing international human rights are not only justifiable, they are to be expected. (Donnell 1999, 121)

When due to international treaties nation states are responsible for the protection of Human Rights a third category emerges. The claim of a right has to stand three tests, otherwise it is invalid: it may not violate existing laws, it may not damage the well-being of the community, and it may not obstruct the rights of others. The European legal controversies and procedure allow us to observe the emergence of diverse types of religious communities that have their rights recognized by democratic societies. (Kippenberg 2013, 143–174) The global right to a public manifestation of religion shows the fundamental problem of the concept of human rights, to be universal and yet knowing only specific national rights.

English translation by Brian McNeil

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