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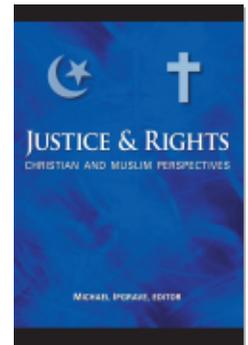
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Chapter 7

Human Rights and the Freedom of Religion

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I approach this topic as an international lawyer interested and involved in the protection of religious freedom by and through the means and mechanisms of international law, and particularly through the means and mechanisms of international human rights law. My central point here is that I believe human rights law is developing in a fashion that is likely to hinder rather than assist the realization of the goals of tolerance and religious pluralism. There are two reasons for this. First, the entire human rights approach to religious liberty is increasingly geared toward a form of “neutrality” that is inimical to religious liberty. Second, that approach tends to bear more harshly on some religious traditions than others, undermining the very values that it is said to reflect. To my mind, this increases the need for dialogue between religious communities on such questions. It also means that religious communities, while being fully alive to the need to respect human rights values, should be questioning the direction in which human rights thinking is inclining. I do not think it should be assumed that human rights approaches to questions concerning the relationship of religious believers, as individuals and as communities, to the societies in which they live are necessarily to be preferred or privileged over other conceptions of that relationship.

I should make it clear at the outset that I view human rights as a tool, a methodology for addressing the tensions that arise within the governance of a society. I see human rights as a means of policing the boundaries between the public and the private space, ensuring that the assertion of the authority of the state does not overreach the bounds of legitimacy, while also recognizing that, to a degree, human rights impose minimum requirements upon states for positive assertions of authority in order to ensure that these rights are indeed properly realized. I do not see the international human rights instruments as constituting

an ethical code, although they are frequently perceived as such. Indeed, the manner in which human rights obligations come into being, through a tortuous process of negotiation and political compromise, emphasizes their instrumental rather than their transcendental qualities. Theologians will tend to understand human rights in a different fashion from a domestic lawyer, a domestic lawyer may well understand them differently from an international lawyer, and so on. It is, however, worth reminding ourselves that, no matter how much mystique is generated around them, human rights instruments are the product of varying inputs, many highly contentious, often largely political, and are the product of intense negotiation. They are not the distillation of any particular form of wisdom. They are the product of a pragmatic progress and have to be engaged with as such, as important statements of how the international community believes it can and should configure itself, but not in any sense as moral absolutes. They are tools with which we work.

I do not think that freedom of religion and belief has fared particularly well within the human rights framework. Despite the role of religious belief as being one of the wellsprings from which human rights protection flowed in its earliest days, it rapidly became something of a Cinderella within the protective framework. Despite its appearing in President Roosevelt's "four freedoms," and its figuring as an "easy case" for inclusion as Article 18 of the Universal Declaration of Human Rights, it remains the only one of the key rights identified that has not been developed into a specialist, legally binding instrument.¹ Although there have been attempts to draft an international convention on religious liberty, these stalled in 1967 after the first article had been drafted, and the general view is that it is still premature to return to the exercise. The very fact that it is still seen as so difficult an issue tells us something significant about the relationship between human rights and religious belief. Indeed, it has been a struggle to get the United Nations to address the issue from the perspective of the freedom of religion and belief at all. Although this is the approach of the principal human rights instruments, in 1981 the United Nations adopted a rather different tack in adopting its "Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief." Although this Declaration now tends to be projected as a summation of UN engagement with the freedom of religion and belief, it was originally more focused on questions of nondiscrimination on the basis of religion or belief, and this was reflected in the original title of the mandate of the UN Special Rapporteur, established in 1986 to monitor its implementation.²

The legally binding human rights instruments adopt a common approach to the freedom of religion, and this is exemplified by Article 9 of the European Convention on Human Rights (ECHR), which provides the following:

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

(2) Freedom to manifest one's religion shall be subject to only 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 for the protection of the rights and freedoms of others.

This is a classic human rights formulation. It sets out what appears to be a very clear right—that everyone enjoys the freedom of thought, conscience, and religion. This is generally referred to as the *forum internum*, the sphere of inner belief that is inviolable but that permits little more (if anything) than the freedom to believe what one wishes. When it comes to doing something on the basis of one's beliefs, then this is protected only to the extent that it might be a protected form of “manifestation,” and the European Court of Human Rights has not wavered from the view, first expressed by the European Commission on Human Rights back in 1981, that not all actions that are motivated by a belief are protected forms of manifestation of that belief.³

Assuming that the individual has been manifesting his or her religion or belief, the next question is whether there has been an “interference” with that manifestation in a fashion that is attributable to the state. Thus, in the recent judgment of *Begum v. Denbigh High School*, the majority of the House of Lords thought that the freedom of religion of a fourteen-year-old girl had not been interfered with at all in the sense of Article 9 when she was not allowed to attend school wearing a *jilbāb* (which contravened the school's policy on uniforms) because she remained free to attend other schools where she might do so, and, as Lord Hoffman put it, “people sometimes have to suffer some inconvenience for their beliefs.”⁴ Even if all these hurdles were passed, protected forms of manifestation may be trespassed upon by the state provided that its actions are prescribed by law, are necessary in a democratic society for the safeguarding of the interests set out in Article 9(2), and are a proportionate response. In assessing the legitimacy of the interference, the state is accorded a not inconsiderable margin of appreciation.⁵

It is worth stressing that the human rights framework expressly envisages that there will be clashes between the practice of religion and the application of a human rights framework: The human rights framework itself implies that this will be so. Thus, when religious believers seek to act in accordance with their conscience by, for example, refusing to sell contraceptives in pharmacies in France, and the legitimacy of the response of the French authorities is called into question,

the result is a debate concerning the extent to which human rights thinking protects the freedom of believers to manifest their beliefs in the manner in which they run their businesses.⁶ When teachers wish to wear headscarves while teaching, or students while being taught, and the state, acting in the name of the rights and freedoms of others, seeks to prevent them from doing so, there is a clash of values.⁷ Why pretend it can be otherwise? The key point is that, in the outworking of this, the vision of the judicial body concerning the role of religion in the life of the individual and in the life of the nation is critical.

The very first case in which the European Court of Human Rights addressed these questions directly illustrates the point. The case concerned the legitimacy of a Jehovah's Witness's being convicted in Greece for the criminal offence of improper proselytism. In this case, the court set out what remains its fundamental statement concerning the freedom of religion, emphasizing that "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 a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it."⁸

In the context of the case, the court itself avoided "taking sides" by retreating into proceduralism, emphasizing the failure of the domestic court properly to apply the law.⁹ Individual judges, though, saw the matter rather more starkly, Judge Martens arguing that this was a matter from which the state should retreat as far as possible and leave contestation on matters of religion to religious believers. Judge Valticos, in one of the more colorful pieces of judicial prose ever penned, firmly upheld the right of the state to prevent the religious beliefs of its citizens from being disturbed by the proselytizing activities of others. Subsequent cases tended to support the right of the state to protect believers from forms of expression that failed to evidence "respect" for the views of others (and particularly when such a lack of respect involved offensive portrayals of objects of religious veneration) but did not require them to do so.¹⁰

Looking back at these cases, we can see that they all proceed from an assumption that the state had no direct role to play in the religious life of believers. The bulk of the cases concerned claims by individuals that their ability to act in accordance with their beliefs had been negatively impacted by the actions of the state in some fashion or that their capacity to enjoy their religion had been disturbed by what others had said about them. The role of the court was to ensure that in such cases the boundaries of proper respect had not been crossed, bearing in mind the situation in which the issue arose and the rights and freedoms of others that might be at stake.

A major shift in approach has, however, now taken place, largely as a result of the expansion of the Council of Europe to embrace the countries of central and eastern Europe. This has led to a spate of cases that raised questions concerning the registration and official recognition of religious leaders, communities, and churches, and as a result the court has come to see the role of the state in very different terms, describing it as being the “neutral organiser of religious life within the State.”¹¹ At one level, this may appear wholly benign, as the approach is still built on the same ideas of ensuring respect, pluralism, and tolerance. However, it has become increasingly apparent that this is no longer understood to mean respect by others for religion as much as respect by religions for others. More and more, religious manifestation is seen as permissible only to the extent that it is compatible with the underpinnings of the ECHR system, these being democracy and human rights. The court today seems to identify democracy and human rights with tolerance and pluralism and is apt to construe any forms of religious manifestation that do not show these virtues as posing a threat to central values. Moreover, the court expressly asserts the view that, while secularism is compatible with democracy and human rights, some forms of religious expression simply are not. The most dramatic example of this can be found in the *Refah Partisi* case, in which the Grand Chamber said:

The Court concurs in the Chamber’s view that Shari’a is incompatible with the fundamental principles of democracy, as set forth in the Convention. Like the Constitutional Court, the Court considers that Shari’a, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it. The Court notes that, when read together, the offending statements, which contain explicit reference to the introduction of Shari’a, are difficult to reconcile with the fundamental principles of democracy, as conceived in the Convention taken as a whole. It is difficult to declare one’s respect for democracy and human rights while at the same time supporting a regime based on Shari’a, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women, and the way it intervenes in all spheres of private and public life in accordance with religious precepts. . . . In the Court’s view, a political party whose actions seem to be aimed at introducing Shari’a in a State party to the Convention can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention.¹²

Such statements from the European Court of Human Rights are not likely to encourage those seeking to find space for the expression of faith in the political

society of which they form a part. Once again, according to the court, the human rights approach is to ensure that followers of a religion might believe as they wish and that they might be free to practice the rituals of their faith provided that this is compatible with the general public good, but the state is to rise above religion, ordering and policing its practice but not embracing or reflecting particular tenets of belief.

Against this background, the most recent of this line of cases, *Sahin v. Turkey*, seems an almost inevitable decision. *Sahin* concerned a prohibition on the wearing of headscarves and beards while attending university classes and examinations in Turkey. The court concluded that, although this amounted to a restriction on the manifestation of a religious belief, that restriction was justified in ECHR terms. This has attracted considerable criticism on many grounds, but I wish to highlight the general point that the court seriously distorts Article 9 and the freedom of religion to the extent that it now appears to be as much a tool for the repression of religious liberty as a means of upholding it.¹³ It is true that the court is merely repeating what it has always said when it argues that freedom of religion is “primarily” a matter of individual conscience, when it emphasizes the element of “inner belief” by claiming that the freedom of religion merely “implies” a right to manifest, and when it reiterates that not every act motivated by a religion is a legally recognized manifestation of that religion.¹⁴

This approach dates back to the very first case, that of *Kokkinakis*, in which the court said that “whilst religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to ‘manifest [one’s] religion.’”¹⁵ However, in *Kokkinakis*, the court followed this by saying, “Bearing witness in words and deeds is bound up with the existence of religious convictions,” and went on to find a violation of the freedom of religion in the criminal conviction of a Jehovah’s Witness for proselytism. In other words, it served as a preface to a broadening of the concept. In *Sahin*, those selfsame words are used as a preface to the limiting of the freedom to bear witness, this being brought about by the stress placed by the court on the role of the state as being to “reconcile the interests of the various groups” and to “ensure” respect between believers and between believers and nonbelievers.¹⁶ It even suggests that there is a positive obligation of the state to ensure that this is the case. I find the idea of the state’s being under a positive legal obligation to ensure that religious believers demonstrate respect for each other and for nonbelievers an almost impossible notion. In contrast, the idea that the state might be able to ensure that appropriate processes are in place in order to enhance the prospect of tolerance and mutual respect seems to me to be a more attainable objective, and more in accord with the concept of positive obligations, which work best when they are addressed to means rather than ends.¹⁷

This was not the route followed in the *Sabin* case, however, and at the end of the day the court proceeds on little more than an assertion of the need to preserve general public order and religious pluralism through the eradication of a particular form of public manifestation of religious belief in state-run institutions. Indeed, the need to restrict the manifestation of religion in order to secure pluralism and tolerance between religions is becoming something of a counterintuitive mantra in human rights circles.¹⁸ In adopting such a stance, the court is not acting in an evenhanded fashion, as it is embracing a form of “secular fundamentalism” that is incompatible with its self-professed role as the overseer of the state as the “neutral and impartial organizer” of the system of beliefs within the state. This is deeply problematic for all religious believers.

It is also deeply problematic on another level. As I have already indicated, the court today stresses the role of the state as the neutral and impartial organizer of religious life. In many states—like it or not—religious difference is seen as a threat to public order. Many states use their laws regarding religious associations as a means to differentiate between those forms of religion that are politically welcome and those that are not. It is very difficult to explain to states that they are bound to strive for religious toleration and pluralism through a policy of strict neutrality between all forms of religion and belief, while at the same time insisting that it is quite legitimate for the state to prohibit public forms of religious manifestation that the state considers to undermine its essential political foundations.

Moreover, where does this leave those believers from religious traditions that seek to order their life in the public space in a different way, based on, for example, the tenets of their faith. Why should they be denied the opportunity to do so? The answer that the court provides is that states need to order their affairs in the interests of all within their jurisdiction rather than in accordance with the views and beliefs of some, be they a majority or a minority—and tolerance, respect, and pluralism are difficult values to cross swords with.

Yet these values are not neutral: They are vehicles for the legitimation of a very real set of assumptions concerning the proper reach of religion in the public sphere. Even advancing these claims of human rights through the instrumentality of international law has the effect of validating the interstate system, with its rather peculiar and eminently contestable way of conceiving the ordering of human society.¹⁹ Moreover, it is arguable that the entire way in which we conceive of human rights has the effect of privileging certain forms of religious belief. It is clearly more difficult for what may be called “fringe” religions or new religious movements to benefit from human rights protections than it is for more mainstream religious traditions to do so.²⁰ Beyond this, it seems to me that the practical application of human rights approaches to the freedom of religion is structurally biased toward those forms of religious belief that are essentially private and individualist—one might

say, pietistic—rather than communitarian in organizational orientation. This is not, perhaps, surprising, as the more communitarian-oriented religious traditions tend to challenge the state's ordering of society in a manner that more individualistically focused religions do not. It is not an accident that Western Christianity has found it easier to cohabit with plural liberal democracies than some other forms of religious traditions, though it appears that this is becoming increasingly difficult as human rights thinking concerning the freedom of religion moves away from liberal secularism to what has been described as a form of fundamentalist secularism. This has the perhaps unexpected consequence of increasing the space for religious communities to come together in order to forge their own distinctive contribution to the realization of the freedom of religion or belief, and to do so in a fashion that seeks to challenge, rather than to conform to, human rights law.

In recent times, religious folk have tended to leave the realization of the freedom of religions to the application of human rights law. I believe that there is an increasing realization that it is necessary for the voice of religious believers to be better heard and better understood by the human rights community if freedom of religion is to continue to be best pursued through the application of human rights law in the modern world. There is an equally pressing need for religious communities to refrain from using the legal regulation of religious life to deny freedom of religion to those whose views do not accord with their own, because this merely serves to reinforce the views of those who seek to limit the role of religion in the life of the community as a whole and to place restrictions on the life of religious communities themselves. As a lawyer, I feel there is a need to recapture a vision of law as the just ordering of society in the light of existing conceptions, and that means taking those conceptions as our starting point rather than imposing increasingly alien solutions to questions upon believers in the name of human rights on the mistaken assumption that it is the only acceptable conception.