Regulating Freedom of Religion

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From the United Nations to the European Court of Human Rights

By

Hans G. Kippenberg

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Cambridge Scholars Publishing

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The right to freedom of thought, conscience and religion is probably the most precious of all human rights, and the imperative need to day is to make it a reality for every single individual regardless of the religion or belief that he professes, regardless of his status, and regardless of his condition in life. The desire to enjoy this right has already proved itself to be one of the most potent and contagious political forces the world has ever known. But its full realization can come about only when the oppressive action by which it has been restricted in many parts of the world is brought to light, studied, understood and curtailed through cooperative policies; and when methods and means appropriate for the enlargement of this vital freedom are put into effect on the international as well as on the national plane.

(Krishnaswami, *Study of Discrimination,* foreword; see text 13)

As enshrined in Article 9 (art. 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, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been clearly won over the centuries, depends on it.

(Kokkinakis v. Greece: Judgement of the ECtHR text 32 §31)

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FOREWORD

The relationship between law and religion has interested me, as a scholar of religion, for a long time. When I took part in Professor Peter Schäfer's seminar on magic at the Institute for Advanced Study in Princeton in 1975, I investigated the importance of the category of magic in ancient Roman thought. This led to the conclusion that private religious rituals, if carried out in secret away from the public eye, could certainly bring penalties on the perpetrator, if an accusation was laid before the court that the perpetrator had caused damage (*maleficium*).[1] Roman law, which *per se* had a secular provenance, had formulated legal prohibitions of such ritual actions: they came under the category of *religio illicita.* Assemblies and associations too needed the permission of the emperor, for otherwise they were heretical and could be prosecuted. This secular Roman law was taken over by Christian emperors in the Codex Justinianus.

In the spring of 2003, I conducted the "Brauer Seminar" with Winni Sullivan at the University of Chicago on the topic of "The Western Legal Traditions and Religious Diversity." The concept of *Western legal traditions* was borrowed from Berman's study, but the methodological basis of the seminar was the kind of cultural-scientific investigation of legal systems that has Clifford Geertz as its outstanding representative: "Law … is part of a distinctive manner of imagining the real."[2] The core of the work in the seminar was the way in which religion was "presented" in ancient Roman law, in the mediaeval Codex Justinianus, and in modern American law. Even such a simple sentence as the First Amendment of the US Constitution—"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"—demands that parliament and the government and the courts are to speak of religion and at the same time not to deal with it—a paradox that Winni Sullivan had

[1]"Magic in Roman Civil Discourse: Why Rituals could be Illegal," in: Hans G. Kippenberg and Peter Schäfer (eds.), *Envisioning Magic: A Princeton Seminar and Symposium.* Leiden: Brill 1997, 137–163.
[2]Clifford Geertz, "Local Knowledge: Fact and Law in Comparative Perspective," in: Idem, *Local Knowledge. Further Essays in Interpretative Anthropology.* New York: Basic Books 1983, 167–234, at 184.

elaborated magnificently in a previous publication.[3] She showed, in an examination of appeals against the restriction of rights to freedom of religion through existing laws, the extent to which legal rulings endeavored to establish what normative praxis in religious traditions was, in order to deny believers the right to lay claim to religious freedom.[4]

In 2013 and 2014, together with Professor Georg Ress (from 1998 to 2004 a judge at the European Court of Human Rights in Strasbourg), I conducted two seminars at Jacobs University on the theme of *Claiming Human Rights.* These too had a comparative perspective. Art. 18 of the Universal Declaration of Human Rights set out specific norms and classifications for the right to freedom of thought, conscience, and religion. The seminars studied the local claims that had been made, whether successfully or unsuccessfully, to recognition and to protection on the basis of this article.

Bremen, November 2020

[3]Winnifred Fallers Sullivan, *Paying the Words Extra. Religious Discourse in the Supreme Court of the United States.* Cambridge: Harvard UP 1994.
[4]*The Impossibility of Religious Freedom* (2004). Princeton: UP 2nd ed. 2018.

ABBREVIATIONS

ICCPR	International Covenant on Civil and Political Rights
ECHR	European Convention on Human Rights (formerly European Convention for the Protection of Human Rights and Fundamental Freedoms)
ECtHR	European Court of Human Rights in Strasbourg
ECOSOC	Economic and Social Council
IRFA	International Religious Freedom Act (of the US Congress, 1998)
NGO	Non-Governmental Organization
RNGO	Religious Non-Governmental Organization
UDHR	Universal Declaration of Human Rights (1948)

INTRODUCTION

FREEDOM OF RELIGION FROM A RELIGIOUS STUDIES PERSPECTIVE

> 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.
> (Universal Declaration of Human Rights, article 18)

The article about religious freedom in the 1948 Declaration of Human Rights obliges scholars of religion to reflect anew on their concept of religion. For a long time, religion was interpreted, without much reflection on the matter, as the personal experience of the holy, and Rudolf Otto saw therein something both mystical and terrifying. Scholars in the 1980s took a completely different direction. Under the influence of Jonathan Z. Smith, there was a widespread view that the concept of religion could not claim any universal validity, since it was a product of Western development and had been imposed by scholars on the data of past and foreign cultures. According to Smith, "There is no data for religion. Religion is solely the creation of the scholar's study."[5] Smith's essay "Religion, Religions, Religious" in the book *Critical Terms for Religious Studies* traced the genesis of the Western concept of religion step by step,[6] and showed how it finally became a universal and natural category that was imposed *ab extra* on cultures that had come into being in the course of their own history. This critical observation by Smith accorded with a core question in other cultural sciences, namely, the breach between facts and the concepts that describe them. This dilemma, which ethnologists[7] and

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[5]Jonathan Z. Smith, *Imagining Religion. From Babylon to Jonestown.* Chicago: UP 1982, XI.
[6]Mark C. Taylor (ed.), *Critical Terms for Religious Studies.* Chicago/London: University Press of Chicago 1998, 269-284.
[7]Clifford Geertz, *Works and Lives. The Anthropologist as Author.* Cambridge (UK): Polity Press 1988; James Clifford, *The Predicament of Culture. Twentieth-*

historians[8] face, also disturbs scholars of religion.[9] Mark Taylor indicates the fault line that is common to all these disciplines.

> "Far from existing prior to and independent of any inquiry, the very phenomenon of religion is constituted by local discursive practices. Investigators create—sometimes unknowingly—the objects and truths they profess to discover. Some critics claim that appearances to the contrary notwithstanding, religion is a *modern Western invention*" (Mark C. Taylor).[10]

However, this insight not only undermines an allegedly universal definition of religion; it is also the productive presupposition for the identification of various discourses about local practices, since discourse is not an entity independent of every praxis. In a contribution to the book *Making Religion. Theory and Practice in the Discursive Study of Religion,* Kocku von Stuckrad has pointed out that while discourse is related to a level of action that is independent of it, discourse also forms this level of action by means of this relationship.[11] Even secular constellations of action can be interpreted here as religious, and can then be included as interpretations of this kind in a discourse about "religion," without this discourse thereby becoming dependent on the underlying circumstances.

The idea of an invention of the concept of "religion" by researchers into religion suggests falsely that this concept lacks a real basis in the history of modern culture. However, art. 18 of the Declaration of Human Rights assumes that religion is at home in the private sphere and regards it as inviolable, while regulating the public proclamation of religion in such real matters as teaching, praxis, worship, and observance. And Kevin Schilbrack has shown that one ought to combine the correct insight into the fact that the concept of religion is a construct with the insight that it

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Century Ethnography, Literature, and Art. Cambridge (Mass.): Harvard University Press 1988, see esp. "On ethnographic authority," 21–54.

[8]Hayden White, "Figuring the Nature of the Times Deceased: Literary Theory and Historical Writing," in: Ralph Cohen (ed.), *The Future of Literary History.* New York: Routledge 1989, 19–43.

[9]On this, see Hans G. Kippenberg, "Religious History, Displaced by Modernity," in: *Numen* 47 (2000), 221–243.

[10]Taylor, *Critical Terms,* 6–7.

[11]Kocku von Stuckrad, "Religions and Science in Transformation: On Discourse Communities, the Double-Bind of Discourse Research, and Theoretical Controversies," in: Frans Wijsen and Kocku von Stuckrad (eds.), *Making Religion. Theory and Practice in the Discursive Study of Religion.* Leiden: Brill 2016, 203–224.

shapes a societal reality that cannot be described without this concept. He calls his own approach a critical realistic look at the concept of religion.[12] The present book attempts to explain how "local discursive practices" came to be described as religion, were differentiated by means of further legal concepts, and became an instrument of societal and political regulation.

One consequence of this approach is that the agreements between the local religious practices and the secular designations "teaching, praxis, worship, and observance" can only ever be logical in character. The justification of this assertion likewise goes back to Jonathan Z. Smith.[13] Every comparison is triadic and related to a *tertium comparationis* that is stipulated by the scholar. When we are told that Christianity became similar to the mystery religions in the transition from Judaism to Hellenism, this is a construction of Christian beginnings that is linked—although not explicitly—to the question how Christianity could become Catholic, with the result that salvation could be attained through a sacrament. The genealogy "mystery religions—Christianity" is asserted from a standpoint that has its locus in Protestant polemic against Catholicism. Smith concludes that:

> "The enterprise of comparison, [...] brings differences together solely within the space of a scholar's mind."[14]

With regard to art. 18 of the Universal Declaration of Human Rights, this means that it is not simply obvious what is meant by teaching, praxis, worship, and observance as manifestations of religion: this needs to be clarified. The present study was also prompted by the fact that both individuals and the relevant groups are granted a right to the public manifestation of religion: of teaching, praxis, worship, and observance. The concept of legitimate publicity creates a new and independent level of investigation vis-à-vis religious phenomenology, with its private religious experience of the essence of religion.

William T. Cavanaugh has devoted a voluminous monograph and other essays to the theme of this new level of investigation. His position is that in the course of the genesis of the European nation state and its claim to a monopoly on the use of force, religions were relegated to the private

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[12]Kevin Schilbrack, "Religions: Are There Any?", in: *Journal of the American Academy of Religion* 78 (2010), 1112-1135.
[13]Jonathan Z. Smith, *Drudgery Divine. On the Comparison of Early Christianities and the Religions of Late Antiquity.* Chicago: UP 1990, 83.
[14]Smith, *Drudgery Divine,* 115.

sphere in the form of confessions, and thereby depoliticized. The demand that religion should be free of politics and wholly private corresponded to the architecture of the nation state that came into being after the Reformation. The Reformation and the Counter-Reformation accompanied a historical process that the German historians Heinz Schilling and Wolfgang Reinhard have called "confessionalization"[15] and that led to an alliance between the territorial state and religion. This process of the formation of religiously differentiated territorial powers left a lasting mark, in one single process, on both politics and religion. The free bureaucratic nation state applied the policy of the monopoly on the use of force, so that violence in the name of religions became illegal and illegitimate.[16] However, the article about religious freedom permits a public character of religion and of its manifestations. My reflections as a scholar of religion will concentrate on whether or not the problem of religious violence (in the broadest sense of the term) has thereby become irrelevant; I shall also look at the construction of the manifestation of religion and of the content of the concepts of teaching, praxis, worship, and observance.

Most studies of the freedom of religion stop short at this article; the question of its implementation in the future declarations and institutions of the United Nations (UNO) and in the European institutions is seldom investigated, and is virtually absent both in investigations of the article on religious freedom itself and in the studies of the relevant history of religion and theology. A start is made by Helge Arsheim's study *Making Religion and Human Rights at the United Nations* (Berlin/Boston: Walter de Gruyter 2018), but his interest lies in the autonomy of the discourse about religion in the various committees of the United Nations. He does indeed take great care to present their internal forms of work, but he does not attempt to thematize the development of this discourse about religion in relation to the claims that are made by means of it, although the source materials for this operating context are rich. During the drafting of the International Convention on Civil and Political Rights, which was intended to make the Declaration on Human Rights legally binding and to make the nation state the guarantor of the observation of human rights, a

[15]Heinz Schilling, "Das konfessionelle Europa," in: Hans G. Kippenberg, Jörg Rüpke, and Kocku von Stuckrad (eds.), *Europäische Religionsgeschichte. Ein mehrfacher Pluralismus,* 2 vols. Göttingen: Vandenhoeck & Ruprecht 2009, 289–338.

[16]William Cavanaugh, *The Myth of Religious Violence. Secular Ideology and the Roots of Modern Conflict.* Oxford: UP 2009.

study was published in the name of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (a sub-commission of the Commission for Human Rights). It was written by Arcot Krishnaswami, and located the right of the individual to freedom of religion and conviction within an evaluation of the religions as a whole, which saw them as a necessary presupposition for peace and the brotherhood of the nations. It formulated irrevocable religious rights that concretized the four manifestations of teaching, praxis, worship, and the observance of religious customs that had originally been mentioned in the article. Every member of a religion was entitled to these manifestations: not only office-bearers of church and of theology, but also laypersons. The secular state guaranteed a public sphere of every kind of religion. The authorization of communal religion made it possible to make the religions partners in the realization of the goals of the United Nations. At the same time, however, there was a growing risk that they would become social factors of intolerance and discrimination. This is attested by the relevant resolutions of the UNO General Assembly that called for a struggle against religious intolerance. This led to a discourse that related to the ambivalence of religion, which can both establish a societal moral order and destroy it.[17] This makes the discourse about religion an instrument of the regulation of religious freedom. The discourse about religion has been influenced by religious violence from the 1980s onward.

"Regulation" often describes an intervention by the state in order to maintain free markets. But just as the freedom of the market functions only under the presupposition of regulations (currency; salaries; measures; rules to prevent monopolies, etc.), so too the freedom of religion presupposes regulations, if it is to become a reality. Regulation designates a process policy that aims at preventing the formation of monopolies and other undesired effects of economic decisions. In the sphere of religion, the corresponding state action consists in the maintenance of the free choice of religion and the restraining of undesired effects such as proselytism or intolerance. This, however, does not yet fully describe what is involved here, as a recent study of direct and, above all, indirect

[17]Hans G. Kippenberg, "Die Macht religiöser Vergemeinschaftung als Quelle religiöser Ambivalenz," in: Bernd Oberdorfer and Peter Waldmann (eds.), *Die Ambivalenz des Religiösen. Religionen als Friedenstifter und Gewalterzeuger.* Freiburg i. Br.: Rombach 2008, 53–76.

governance makes clear.[18] States can delegate some of their own tasks to organizations, which they control directly by subjecting them to the state laws and directives. But if a transfer of tasks to an organization is made because only it is capable of reaching effectively the target group of state action, this organization must possess the freedom to do so with the aid of intermediaries that allow it to enforce the rules of the state. Unlike a direct hierarchical model of governance, this model is supple and indirect. This is why the authors of the study employ the concept of "orchestration," which they apply to international organizations such as the UNO or the European Union (EU). These organizations are founded by states, and owe their existence and their importance to a delegation of state power, but they can achieve their task of implementing specific norms only indirectly and in a supple manner, with the aid of intermediary groups. Orchestration is a special form of the supple and indirect form of management, with the aim of achieving goals by coordinating the activities of intermediaries with the use of arguments or incentives.

In the case of art. 18 of the Universal Declaration of Human Rights and the European Declaration of Human Rights, it is the UNO and the EU that impinge upon the actions of members of religions by means of contracts with states. We shall see that the delegation of regulatory competence to these organizations, and their carrying out through other intermediaries of the tasks with they have been entrusted, are not without their consequences. The religious organizations received inviolable rights. Religion now manifests itself also in international religious NGOs. Their public activity makes them global players, and hence also potential partners (or also adversaries) in the foreign politics of nation states.

This book also describes in detail the regulation of religious freedom in the decisions of the European Court of Human Rights in Strasbourg. Its task was to examine national verdicts about complaints regarding the restriction of the manifestations of religion. The Europeanization of the Convention has bridged conflicts and contradictions between the Convention and the various national practices, and has made relationships between state and religion visible. These had to be clarified in trials before the European Court of Human Rights, which had to decide about the criteria of legal or illegal manifestations of religion. My presentation

[18]Kenneth W. Abbott, Philipp Genschel, Duncan Snidal, and Bernhard Zangl, "Orchestration: global governance through intermediaries," in: Idem (ed.), *International Organizations as Orchestrators.* Cambridge: UP 2015, 3–36.

describes important rules that the Court itself regarded as laying down the criteria for every case.

The legal texts will be found in an Appendix.

CHAPTER 1

AN INALIENABLE RIGHT OF ALL HUMAN BEINGS: FREEDOM OF RELIGION AND BELIEF IN THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

The great importance of human rights today, and their historical entrance upon the scene in the USA and France towards the close of the eighteenth century, make it easy to overlook the fact that there is no direct continuity between then and now. In the Declaration of Independence of the thirteen British colonies from England in 1776, Thomas Jefferson justified this revolutionary act by affirming that all human beings "are created equal, that they are endowed by their Creator with certain unalienable Rights," including "Life, Liberty, and the pursuit of Happiness." In order to guarantee these rights, governments have been established among human beings. If, however, a government proves to be harmful with regard to these goals, the people is entitled to depose it and to install a new government in accordance with what seems necessary in order to safeguard the people's safety and happiness.

The colony of Virginia declared its independence from the British crown in 1776 in a Declaration that demanded the right to the free exercise of religion, a right that was universal and derived from reason and from the voice of conscience.

> That religion, or the duty which we owe to our Creator and the manner of discharging it, can be directed by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that is the mutual duty of all to practice Christian forbearance, love, and charity towards each other. (Art. 16; text 1)

The preamble to the Declaration of Independence of the USA in 1776 set out the principles that were to determine this independence:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. (text 2)

A revolutionary solution became a constitutional principle. In accordance with these affirmations about religion and the government, an addition was made in 1791 to the basic bill of rights of the USA:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. (First Amendment; text 3)

In this way, religion was to be protected against the exercise of political influence by Congress.

The lack of religious freedom was likewise one of the reasons put forward in August 1789, when the French National Assembly justified its rejection of the *ancien régime.* The French bourgeoisie liberated itself from the domination of the aristocracy and the clergy, and its Declaration of Human and Civil Rights explained that this was because of their contempt for human rights: indeed, this was the cause of the public misery. A solemn Declaration laid down the natural, inalienable, and sacred rights of human beings: “Men are born and remain free and equal in rights. Social distinctions may be based only on considerations of the common good” (art. 1). The proclamation of the Declaration also decreed the freedom of religion.[19]

> No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law. (art. 10; text 4)

[19]The tumults that accompanied the adoption of this article are described by Marcel Gauchet, *La révolution des droits de l’homme.* Paris: Éditions Gallimard, chapter 6.

These words demand a universal and rational right to religious views, albeit with the restriction that this must be in accord with the public common good.

These two documents belong to a specific period and society, in which a bourgeoisie freed itself from a social order based on birth and privilege: on monarchy, aristocracy, and clergy. The bourgeois criticism of this situation went hand in hand with the affirmation of a natural religion that was accessible to everyone and that empowered everyone to criticize traditional orderings.[20]

1.1 Freedom of religion: from an obligation incumbent on the state to an inalienable human right

The subsequent history of the two Declarations was anything but a straight path that led to the *Universal Declaration of Human Rights* (UDHR) in 1948. In the nineteenth century, appeal was seldom made to human rights, even in the countries where these Declarations had originated. In the USA, slavery remained legal until the Civil War, which forced the abolition of slavery on the plantations of the south (1861–1865). The abolition was preceded by a growing empathy on the part of educated persons with groups that were deprived of their rights, as Lynn Hunt has shown in her study of eighteenth-century novels.[21] The thirteenth Amendment to the Bill of Rights in 1865 forbade slavery. The fourteenth Amendment in 1868 declared that the individual states were not permitted to issue any laws that limited the privileges and rights of the citizens in the Bill of Rights (the first ten Amendments). It is precisely the clause about religion that demonstrates how long it would still take for these basic rights to become in the US universal praxis.[22]

The first Amendment to the American Constitution, which together with nine others laid down the basic rights of the citizens (the so-called Bill of

[20]The presentation of this development by Joachim Matthes remains worth reading: *Religion und Gesellschaft. Einführung in die Religionssoziologie,* Vol. 1. Reinbek: Rowohlt 1967, 32–88.
[21]Lynn Hunt, *Inventing Human Rights. A History.* New York: Norton 2007 (see ch. 1, "Torrents of Emotion. Reading Novels and Imagining Equality," 35–69).
[22]Arnold H. Loewy brings together cases and legal materials in three chapters: "Establishment Clause," "Government Financing of Religion," and "Free Exercise of Religion," in: *Religion and the Constitution. Cases and Materials.* St. Pauls (Minn.): West Group 1999.

Rights), protected religion from interventions by Congress and guaranteed its free exercise. Initially, this additional article covered only the federal organs, not the individual states. And even Congress itself did not take the Amendment all too literally; its sessions were, and are even today, opened with a prayer by a Christian minister, and Congress saw no problem in 1952 about adding the phrase "under God" to the word "Nation" in the American pledge of allegiance.[23] It was only in the second half of the twentieth century that citizens successfully appealed to the Supreme Court for verdicts that included the federal states in the clause. The Court prohibited prayers in public schools of the federal states and forbade a legal preferential treatment in biology classes to religious doctrines over scientific teaching (even in the twentieth century, federal states had issued such regulations about the teaching of biology in public schools).[24] This inclusion of the federal states did not, however, entail only disadvantages for religious organizations. If federal states gave financial support to secular schools in their fulfillment of the legal task of education, it was not allowed to refuse this funding to religious schools too by appealing to this Amendment.[25] The Supreme Court issued a number of verdicts that forbade treating religious bodies differently from secular bodies. This meant that the extension of the "disestablishment" article to the federal states had the paradoxical effect of giving religious bodies a right to equal treatment and thereby access to state funding.

The Dreyfus affair at the close of the nineteenth century showed that the concept of human rights remained effective in France. The Catholic church did indeed exercise considerable power in every sphere of society in the nineteenth century, and it was only in 1905 that a law prescribed a

[23]"I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all."

[24]Prohibition of prayer in public schools: Engel v. Vitale, 370 U.S. 421 (1962); prohibition of legal preferential treatment of the creation narrative over evolutionism in biology teaching in state schools: Epperson v. Arkansas, 393 U.S. 97 (1968). On the recent history of constitutional jurisprudence, which has interpreted state neutrality as the equal treatment of religion and non-religion, see Mark DeWolfe Howe, *The Garden and the Wilderness. Religion and Government in American Constitutional History.* Chicago: UP 1965 (ch. 6: "Equality and Neutrality in the Law of Church and State," 149–175).

[25]Winnifred Fallers Sullivan, *Paying the Words Extra. Religious Discourse in the Supreme Court of the United States.* Cambridge, Mass: Harvard UP 1994, 42–45, 63–68; Winfried Brugger, *Einführung in das öffentliche Recht der USA.* Munich: C.H. Beck 2nd ed. 2001, 185–194 ("Die Religionsfreiheit").

secularization of the church's property and its educational institutions. The church at that time still rejected a right to freedom of religion. In 1898, Émile Durkheim justified the right of intellectuals to criticize the behavior of state authorities by arguing that no *raison d'état* could justify an attack on the person of a citizen and on reason: this is the core argument of human rights.[26]

The Covenant of the League of Nations (1920–1946) did not mention human rights. It mentioned freedom of religion only incidentally and in a lapidary manner in art. 22 on the mandate territories, threatening restrictions where public order was put at risk:

> Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic. (art.22, text 5)

States or governments that belonged to the League of Nations were obliged to grant freedom of religion. This was neither an actionable right of individuals nor an actionable collective right of a minority.[27]

An especially informative case is the 1923 Treaty of Lausanne, which put an end to the state of war between the British Empire, France, and other states on the one side, and the Ottoman Empire on the other. It laid down the boundaries of the newly created state of Turkey and other new states, and also stipulated the rights of minorities. Art. 38 prescribes a protection for all the inhabitants of Turkey:

> All inhabitants of Turkey shall be entitled to free exercise, whether in public or private, of any creed, religion or belief, the observance of which shall not be incompatible with public order and good morals. (art.38, text 6)

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[26]Émile Durkheim, "Individualism and the Intellectuals", in: W.S.F.Pickering (ed.), *Durkheim on Religion. A selection of readings and bibliographies.* Routledge & Kegan Paul: London 1975, 59-73.

[27]Christian Walter, "Religion or Belief, Freedom of, International Protection." In: *Max Planck Encyclopedia of Public International Law* (2008); Idem, *Religionsverfassungsrecht in vergleichender Perspektive.* Tübingen: Mohr Siebeck 2006, 456-457.

The following section of this article states that non-Muslim minorities are to enjoy the same freedom of movement and of emigration that applies to all Turkish citizens. Here, we do indeed hear the language of an entitlement to the exercise of religion in the public sphere, but other aspects can be heard here too. What looks like a genuine right turned out—in conjunction with treaties about the exchange of populations between Greeks in Turkey and Muslims in Greece—to be an instrument of ethnic cleansing and displacement.[28] The religious homogeneity of a nation state is assumed to be a matter of course, the normal case; and the existence of other religious communities in the territory of the same state is regarded as an exception that requires international guarantees in treaties. Later on, in the Universal Declaration of Human Rights in 1948, membership of a minority becomes a right of the individual, like membership of a religious community. For a long time, this made a special regulation of minorities superfluous, and made a plurality of religious or ethnic groups the normal case.

Some legal scholars and philosophers spoke out in the 1920s, appealing to the conception of unconditional human rights against the increasing political totalitarianism and authoritarianism. In retrospect, these were pioneers of a new international obligatory character of human rights.[29] According to Stefan-Ludwig Hoffmann, "The history of human rights between 1793 and 1948 bears witness, not to a universal development of the idea of natural rights, but of particular claims and violent caesuras."[30]

1.2 Justification and extent of religious freedom

When the United Nations adopted a Charter in 1945, its starting point was not the League of Nations and its (largely unsuccessful) protection of the rights of minorities, but rather the conception of human rights. In the preamble to the 1945 Charter, the member states confirm their belief in the

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[28]Norman Naimark, *Fires of Hatred. Ethnic Cleansing in Twentieth-Century Europe,* Cambridge (Mass.), London: Harvard UP 2002, 11-16; Robert Gerwarth, *The Vanquished: Why the First World War Failed to End.* New York: Farrar, Strauss, and Giroux 2016, 243–247.

[29]Jan Herman Burgers, "The Road to San Francisco: The Revival of the Human Rights in the Twentieth Century," in: *Human Rights Quarterly* 14 (1992), 447–477.

[30] Stefan-Ludwig Hoffmann, in his introduction to idem (ed.), *Moralpolitik, Geschichte der Menschenrechte im 20. Jahrhundert.* Göttingen: Wallstein 2010, 7–37 ("Zur Genealogie der Menschenrechte"), at 14.

basic rights of the human being, in the dignity and value of the human personality, and in the equality of men and women as well as of all nations, whether large or small.

> *Preamble*: We the peoples of the United Nations determined: […] to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom. And for these ends: to practice tolerance and live together in peace with one another as good neighbors. (text 7)

The revival of the conception of human rights came as a surprise. Burgers offers a plausible explanation. After the end of the National Socialist dictatorship, the problem of the freedom of the individual from arbitrary state rule became the highest priority, and it was the declared will of the founding states of the United Nations to safeguard this freedom.[31] Something similar occurred again in 1975, with the Final Act of the Conference on Security and Cooperation in Europe: here, the experience of the so-called socialistic people's democracies in Eastern Europe was the sounding board for the self-commitment of the European states to respect and safeguard human rights and basic freedoms, including the freedom of thought, conscience, religion, and belief.[32]

Freedom of religion had its place in the 1948 Universal Declaration of Human Rights. Three years after the Charter of the United Nations had been promulgated, entrusting the new organization with the promotion of human rights, the General Assembly of the UN in Paris adopted the "Universal Declaration of Human Rights" (UDHR), whereby the member states committed themselves to work for the universal respect and observance of human rights. The Declaration lacked as yet a legally binding character, but on the day it adopted the Declaration, the General Assembly asked the Commission on Human Rights to prepare the draft of a legally binding Convention. One year later, the Commission presented a draft and began the revision of its first articles.[33] The *International*

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[31]Burgers, "The Road to San Francisco," 447–477.

[32]Art. 7: "The participating States will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion."

[33]UN Office of the High Commissioner for Human Rights (OHCHR), Fact Sheet, *The International Bill of Human Rights,* June 1995, No. 2 (Rev. 1),

Covenant on Civil and Political Rights (ICCPR) was adopted in 1966 and came into force in 1973 after it was signed by a specific number of member states of the UN.

Art. 18 of the UDHR conceived of the right to freedom of religion as an individual right; a community right existed only as derived from this:

> 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. (art.18, text 8)

Every human being is a bearer of this right; everyone has the right to change one's religion and to manifest one's own religion in public. The sacralization of the person that Hans Joas has described applies to this state of affairs too.[34]

We should note how "thought" and "conscience" are mentioned before freedom of religion, thereby justifying a reflexive and possibly unconventional understanding of religion and belief. Not only faith itself, but also its public manifestation and its praxis are protected. After years of the experience of religious hatred, the *Rabat Plan of Action* declared in 2013:

> Free and critical thinking in open debate is the soundest way to probe whether religious interpretations adhere to or distort the original values that underpin religious belief. (text 18, nr. 10)

In his acute and thorough examination of art. 18 of the Universal Declaration of Human Rights, Linde Lindkvist brings to light another kind of vision, as a reaction to the war crimes of the Second World War, a

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http://www.refworld.org/docid/479477480.html. "On the same day that the General Assembly adopted the Universal Declaration, the General Assembly requested the Commission on Human Rights to prepare, as a matter of priority, a draft covenant on human rights and draft measures of implementation. The Commission examined the text of the draft covenant in 1949 and the following year it revised the first 18 articles." On the genesis of the document and its further history, see: Malcolm D. Evans, *Religious Liberty and International Law in Europe.* Cambridge: UP 1997, 194–226 (ch. 8: "Article 18 of the International Covenant on Civil and Political Rights"); Linde Lindkvist, *Religious Freedom and the Universal Declaration of Human Rights.* Cambridge: UP 2017.

[34]Hans Joas, *The Sacredness of the Person. A New Genealogy of Human Rights. (*German Original 2011) Washington: Georgetown University Press 2013.

vision that was also influenced by a dispute with spokesmen of materialism and communism in the committee. Lindkvist draws attention to one member in particular: Charles Habib Malik, a Lebanese Christian and an intellectual with an international academic career, who took up conservative ideas and employed them to posit an antithesis between an internal religion and its external manifestation. The sphere of the *forum internum* enjoys unconditional protection by law; thanks to reason and conscience, the human being is free from every kind of coercion and is empowered to know the truth. But the *forum externum* is subject to legal restrictions.[35] This distinction could make internal religion an antidote to materialism and communion, if it were brought into the public sphere. Other philosophical, legal, and theological positions at that period culminated in a vision of this kind.[36] The first article of the Universal Declaration is likewise influenced by it.

> Art. 1. 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. (art.1, text 8)

The *International Covenant on Civil and Political Rights* (ICCPR) that was then adopted envisaged in art. 28–45 the establishing of a Human Rights Commission or Human Rights Committee.[37] Art. 40 (4) gave it the task of examining the reports that the states were obliged to submit on the realization of human rights, and of making its own reports about these, with *General Comments* that seemed appropriate.[38] In the case of art. 18 on freedom of thought, conscience, religion, and belief, the Committee carried out this procedure and drew up General Comment 22 in 1993, thereby creating, in connection with the implementation of the *United Nations Declaration on the Elimination of All Forms of Intolerance and*

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[35]Heiner Bielefeldt, Nazila Ghanea, and Michael Werner, *Freedom of Religion and Belief. An International Law Commentary.* Oxford: UP 2016, 107–116 ("Freedom to Worship").

[36]Lindkvist, *Religious Freedom and the Universal Declaration of Human Rights,* 19–60 ("Freedom of Thought and Conscience").

[37]The UN Commission or Committee on Human Rights was replaced in June 2006 by the United Nations Human Rights Council (UNHRC) in the course of a reform of the UNO.

[38]David Roth-Isigkeit, "Die General Comments des Menschenrechtsausschusses der Vereinten Nationen—ein Beitrag zur Rechtsentwicklung im Völkerrecht," in: *MenschenRechtsMagazin* 2 (2012), 196–210.

Discrimination Based on Religion and Belief (1981), a standard for the freedom of religion and belief[39] that was urgently awaited[40] (text 9).

> 22 (4) The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of *worship* extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The *observance* and *practice* of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head-coverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group. In addition, the *practice* and *teaching* of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications. (text 9)

This classification aims at establishing a catalog of actions that belong directly to the formal, practical aspect of religion. Individual actions based only on personal religious convictions do not belong to this category, nor does the list explicitly mention welfare and humanitarian institutions. According to M.D. Evans, the manifestations of religion and belief in worship, observance, praxis, and teaching are defined in a relatively restrictive manner, and are based on lay religiosity.[41] These must be actions that believers perform in a regulated manner with others, or like others. But it is the individual believers who remain the bearers of the right

[39]Kevin Boyle and Juliet Sheen, *Freedom of Religion and Belief. A World Report.* London/New York: Routledge 1997, 5–7.

[40]Declaration of the Human Rights Committee in March 1993: "It welcomes the intention of the Human Rights Committee to make available soon a general comment on article 18 of the International Covenant on Civil and Political Rights, dealing with freedom of thought, conscience and religion (§ 16)."

[41]Evans, *Religious Liberty,* sees the four manifestations mentioned here—worship, observance, praxis, and teaching—as an exhaustive catalog. These categories restrict the extent of the protection and are linked to the formal praxis of religious rites and customs. "Forms of behavior and activities which flow from religious convictions are not seen as manifestations of belief" (215–16). However, the General Comment expands the concept of *worship* to include individual actions that directly express faith. The same happens with the other concepts.

of manifestation. The existence of a state religion does not in any way restrict these rights.

> 22 (9) The fact that a religion is recognized as a *state religion* or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers. (text 9)

This is a matter of religiously authorized conceptions of the lifestyle of lay persons, independently of the official legal status of the religions. When the Declaration was drawn up, Jewish organizations had urged the adoption of the category of observance, in order to anchor in the Declaration respect for the Sabbath commandment, Jewish feasts, and the consumption of meat slaughtered in accordance with kosher rules and other rituals of Jewish daily life, completely independently of whether these were recognized by the state.[42]

The article about religion in the UDHR deliberately says nothing about the kind of religion involved. It makes no distinction between a majority and a minority religion.[43] The entitlement to public manifestation has nothing to do with whether a religious community is old and established, or has just found its first adherents and counts as a sect; nor with whether it has national roots or consists of immigrants.[44] The article sets up a framework

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[42]Bielefeldt, Ghanea, Wiener, *Freedom of Religion and Belief,* 92–106 ("Right to Religion or Belief"), esp.97–98; Lindkvist, *Religious Freedom and the Universal Declaration of Human Rights,* 28 and 107 on the involvement of Jewish organizations.

[43]Art. 2 of the UDHR stipulates that there must be no discrimination on grounds of religion.

[44]The category of minority religions belongs in this context. When the UDHR was to be translated into international law (in the Covenant), "States in which ethnic, religious or linguistic minorities exist" were forbidden from refusing people "the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language" (ICCPR art. 27; text 10). The concept of the "religious minority" was given a legal anchoring. The 1992 *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (https://www.ohchr.org/Documents/Publications/GuideMinoritiesDeclarationen.pdf, retrieved 27.07.2018) speaks of "persons belonging to minorities," thereby making the individual the bearer of the rights of minorities. After these had been marginalized for a long period in the UN, a report by Francesco Capotorti in 1977